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Transcript of CONTU Meeting No. 13
Held at New York, New York on
March 31-April 1, 1977

Nat'l Commission on New Technological Uses of Copyrighted Works.

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THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES
OF COPYRIGHTED WORKS

(CONTU)

Thirteenth Meeting

March 31, 1977
April 1, 1977

Room 1512
International Affairs Building
Columbia University
420 West 118th Street
New York, New York

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STANLEY H. FULD -- Chairman
Retired Chief Judge,
New York Court of Appeals
Special Counsel, Kaye, Scholer, Fierman,
Hays and Handler

MELVILLE B. NIMMER -- Vice Chairman
Professor of Law
UCLA Law School

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For Daniel J. Boorstin
Librarian of Congress

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Retired Register of Copyrights

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2<

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1
2 JUDGE FULD: May I call to order the
3 thirteenth meeting of the National Commission on
4 New Technological Uses of Copyrighted Works and
5 extend a welcome to all who are with us.

6 May I say at the outset that we are grateful
7 to Columbia University for providing this room for our
8 hearings today and tomorrow, and particularly to
9 Mr. Warren J. Haas, University Vice President and
10 University Librarian.

11 At the Commission's hearing on January 14th,
12 Mr. Irwin Karp, Counsel to the Authors League, inquired
13 as to whether the Commission intended to prepare
14 certain further guidelines on library photocopying
15 in consultation with interested parties. The Commis-
16 sion discussed this matter at its February 24th
17 meeting and agreed on a response to Mr. Karp.

18 That response is in a letter dated March
19 15th from Arthur Levine, our executive director, and
20 I am now making it part of our record and hand it
21 to our reporter.

22 (The letter referred to above reads

23 as follows:

24 " Mr. Irwin Karp
25 Woodland Drive
Port Chester, New York 10753

Dear Irwin:

In your appearance before the Commission on January 14, 1977, you requested an expression as to whether the Commission intended, in consultation with the parties concerned, to develop further guidelines relating to photocopying. The further guidelines you mentioned were:

(1) With respect to §108(g)(2)

- a. Guidelines defining "aggregate quantities" under the proviso relating to interlibrary arrangements, for periodical articles more than five years old.
- b. Guidelines defining "aggregate quantities" and other provisions for in-house library reproduction of copies of periodical articles and other literary materials including contributions and small parts of copyrighted works.

(2) Guidelines with respect to §108(g)(1) relating to a library engaging in related or concerted reproduction

or distribution of multiple copies of the same material made on one occasion or over a period of time.

(3) Guidelines spelling out the meaning of "reasonable effort" and "fair price" under §108(c) dealing with single copy reproduction by libraries to replace lost, stolen, or damaged copies.

(4) Guidelines relating to "reasonable investigation," "fair price" and other requirements of §108(e), dealing with single copy reproduction of out-of-print works.

The Commission discussed this matter in its meeting on February 25, 1977, and concluded that it was not at this time prepared to reach a decision one way or the other. For one thing, there are certain factual data being collected, studied and analyzed that will not be available to the Commission for another three to five months. At that time the Commission will probably wish to review your questions again."

JUDGE FULD: I would also like to place

1
2 on the record an analysis of the sampling of the
3 National Agricultural Library photocopy in lieu of
4 loan activities. It has been submitted to us by
5 Dr. Olson of that library in response to a request
6 by Commissioner Lacy at the Commission's hearing
7 on January 13th. I would like also to submit that
8 to the reporter.

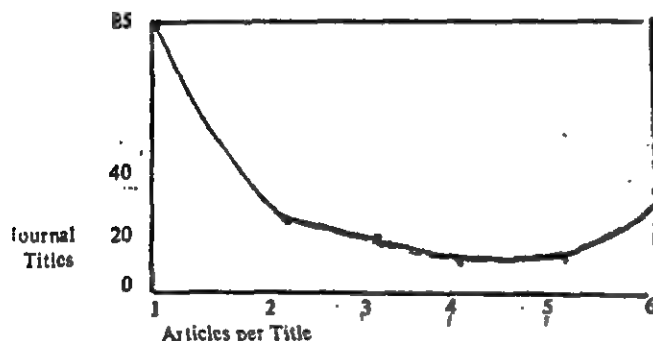
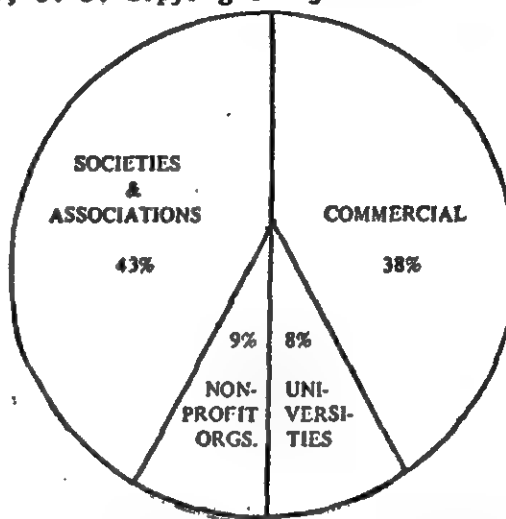
9 (The analysis referred to above
10 reads as follows:
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SAMPLING OF NATIONAL AGRICULTURAL LIBRARY PHOTOCOPY IN LIEU OF LOAN ACTIVITIES

In March 1976, a survey of 1,067 photocopies supplied in lieu-of-loan of the hardcopy was made for a two week period. With a view toward the influence of the copyright law provisions beginning January 1978, the completed requests were broken into two categories:

- A. 546 completions from foreign and pre-1970 journals (deemed outside the copyright provisions)
- B. 496 completions from post-1970, U. S. copyrighted journals.

The 496 requests were filled from 176 journal titles grouped into these four categories of publishers:



These 496 requests from 1976 journal titles were largely one article per journal title, but were scattered.

These observations are made:

1. The spread or concentration of articles per title probably would vary dramatically over a sampling period of greater length, particularly over one year. From past experiences, there is reason to believe that the greatest number of photocopies come from a relatively small number of journal titles.
2. Some variations from the standard Bradford distributions are possible with these figures and all NAL photocopying in lieu-of-loan for the following reasons:
 - A. There are many subscriptions by USDA personnel and organizations to the most commonly needed journals. This may tend to lower demand on NAL for the most popular items.
 - B. The USDA has 17 major field libraries plus several reading rooms which have the more widely used journals. The less common journal article requests are sent to NAL for completion.

These factors of time and organizational structure may have skewed these data. We have not been able to run a systematic study for a period of one year which might give more valid data.

1
2 panel and looks forward to hearing about the plans
3 of the AAP for establishing a payments center for
4 authorized photocopying.

5 I would note that in taking this testimony,
6 the Commission of course is not taking any position
7 on these plans. Of necessity, we must also consider
8 the plans of ^{other} ~~author~~ organizations and various alterna-
9 tive recommendations that relate to photocopying.

10 Which of you gentlemen is going to speak
11 first?

12 MR. LIEB: Judge Fuld, I will.

13 STATEMENT OF CHARLES H. LIEB

14 COPYRIGHT COUNSEL

15 ASSOCIATION OF AMERICAN PUBLISHERS

16 MR. LIEB: Judge Fuld, Ladies and Gentlemen,
17 I will take the lead, but each one of us will welcome
18 questions from you and each one of us will respond
19 as you direct them..

20 Thank you for the opportunity to present
21 our testimony this morning.

22 We have prepared and submitted a paper
23 entitled "Program for the Provisions of Copies of
24 Technical-Scientific-Medical Journal Articles and
25 for Related Information-Service Copying"; and we have

1
2 also submitted a copy of a paper which I will not
3 read but from which I will talk, and I ask permis-
4 sion to offer both of these documents in the record.

5 I believe that you received in advance
6 of this hearing, copies of the program and we have
7 distributed fresh copies this morning. There are
8 two changes which should be made on the copies that
9 you received some days ago if those are the copies
10 that you are working from.

11 On page 3 in the first paragraph, the
12 second sentence in the fourth, fifth and sixth lines
13 at the top of page three should be eliminated. If
14 you have the copies that were distributed this
15 morning, they are already eliminated.

16 On page 5 under item 7, in the third line
17 following the words "reasonable copying," there should
18 be an insert in parenthesis, "Not for public distribu-
19 tion."

20 Similarly on page 3 of the prepared remarks
21 from which I will be speaking, in the full paragraph
22 below item 4, the same phrase, "Not for public distribu-
23 tion," should be inserted on the sixth line of that
24 paragraph following the words, "reasonable copying."

25 Thank you. .

11<

AFFILIATED REPORTERS, INC.

1
2 The specifics of our program are included
3 in the document entitled "Program." In principle,
4 and let me summarize it for you, it covers these
5 points:

6 First, the program calls for the establish-
7 ment of what we would call a copy payments center
8 which would be a not-for-profit organization through
9 which user organizations, including libraries and
10 information services, may pay centrally for their
11 journal article copying that exceeds fair use or that
12 exceeds the CONTU guidelines in the library arrange-
13 ments. This will relieve the participating users
14 of the need to obtain individual licenses from
15 the publishers whose material they are copying and
16 for making payments individually to them.

17 The fees for the copying from the journals
18 will be established individually by each journal
19 publisher.

20 The target date for inclusion of the code
21 which will establish not only the identity of the
22 publisher and the identity of the article but the
23 copying charge is January, 1978. It is possible
24 also that publishers may require payment for copy-
25 ing fees for copying of copyrighted articles published

1
2 prior to 1978, in which case it is proposed that
3 a central register or list would be published by
4 the Copy Payments Center which would establish what
5 the individual journal charges are for copying from
6 their journals.

7 The participating users, who could be
8 anybody and any organization supplying copies to
9 others which would include commercial organizations
10 serving now as commercial information and copy
11 providers, will, when they register their own code,
12 report the copying that they do in any one of a
13 number of several ways and will pay for this copying
14 possibly either by the use of stamps which they would
15 have purchased in advance or through charges to a
16 deposit account which they would have established
17 with a not-for-profit copying center or otherwise.

18 Their reporting can be as complicated as
19 one company suggested it would want, namely, through
20 a computer run tape of the copying that it would do,
21 or it could be as informal and as rudimentary as the
22 supplying and furnishing to the Copy Center of an
23 extra copy that they would make of the first page
24 of the copied article which would contain, at the
25 foot of the article, the code identifying the publisher

1
2 and price.

3 I should say and it should be needless
4 to say, that failure by a user to register would
5 not exempt the registerer from the obligation
6 to pay.

7 The participating publishers of technical,
8 scientific and medical journals and such other
9 journals and periodicals as may enter the program
10 may also continue to lic. ^{user} users to sell and
11 to provide separates as they do. 4. Alternately,
12 organizations may supply copies without a license
13 by paying the stated fee as provided in the code.

14 If this system does not prove adequate,
15 we could consider the establishment of print centers
16 that could serve as a centralized facility for the
17 service for the supply of separates, but we would
18 hope that the commercial sector would prove adequate
19 to ^{but} the responsibility.

20 As stated in the attachment, the participa-
21 tion by TSM journal publishers, and when I say "TSM"
22 I am not talking of the subdivision of AAP; I am
23 using that as an abbreviation for "technical, scien-
24 tific and medical" journals regardless of what, if
25 any, organization, they belong to -- will be on a

1
2 voluntary basis and the chartering of the Copy
3 Payments Center and the other steps in this program
4 may require Department of Justice clearance. If
5 it does, and as I suggested to you in January, my
6 own opinion is that it will; we will look to you for assistance
7 assistance and hope that it will be forthcoming. 3.

8 However, to approve the universality of
9 the system, we would favorably consider what we
10 call an umbrella statute which would protect users
11 by permitting reasonable copying (not for public
12 distribution) of journal articles published by
13 publishers not in the system, provided that the
14 copier would be subject to the obligation to pay
15 a reasonable copying fee but would be excused from
16 the otherwise statutory obligation of an infringer
17 to pay either statutory damages or attorney's fees.

18 At the January hearing, some of you asked,
19 "What about other types of journals," and you were
20 rather critical, I thought, at the time of the
21 limitation of the scope of our plans to technical,
22 scientific and medical journals.

23 As our program states we are aware that
24 demands exist for the provision of separates or
25 for the copying of other copyrighted short documents,

1
2 such as articles in scholarly journals and, indeed,
3 articles in business and trade periodicals. We
4 make it clear in our program that any publisher
5 of any kind of periodical may, if he chooses,
6 participate in our program, and he does this just
7 by placing his coding at the foot of the page and
8 indicating the charge that he requires.

9 Our program places primary emphasis on
10 technical, scientific and medical journals, because
11 we know that that is where the heaviest pressure
12 for copies lies, and also because historically it
13 is the AAP Technical, Scientific and Medical
14 Division, which has taken the leadership in formulat-
15 ing this program, but we want to emphasize that
16 exclusivity is neither intended nor involved and
17 it will be our goal to provide for universality if
18 that proves practicable; otherwise, cooperation
19 with others will hopefully take its place.

20 We were asked at the last hearing why
21 we had waited so long to initiate this program,
22 and I think I replied that the prime reason was
23 that we sought cooperation from user groups, rather
24 than proceed unilaterally. I believe that some
25 chronology as to our efforts would be in order,

1
2 and I would like just quickly to run over an
3 outline of what the efforts have been.

4 In 1971 and '72, representatives of author
5 interests, library interests and of journal publishers
6 met in the so-called "Cosmos Club" negotiations, which
7 with meetings to discuss a method by which by which
8 separates might be provided without individual
9 negotiations.

10 In 1973 there was participation even by
11 a wider group under the aegis of Harvard in the
12 so-called "Dumbarton Oaks" weekend talks, and the
13 principles that were discussed at that time at
14 Dumbarton are basically the nucleus of what we
15 are presently proposing.

16 In 1974 and 1975 we participated with
17 authors and librarians and NCLIS and the Register
18 of Copyrights in the Conference on Resolution
19 of Copyright Issues and in its committees and
20 working groups. As you know, these discussions
21 led to the presently ongoing King Research studies.

22 In 1975 and 1976, during the progress
23 of the copyright revision bill, book and journal
24 publishers joined with authors in the definition
25 of guidelines with educators for fair use copying

17<

1
2 for classroom purposes, and also cooperated with
3 you in the CONTU-sponsored guidelines for inter-
4 library arrangement copying.

5 In February, 1976, IIA and AAP sponsored
6 a forum in Washington to discuss the practicability
7 and advisability of clearing houses for copying.

8 Finally, as you know, there are repre-
9 sentatives of journal publishers who are acting
10 as advisors on advisory committees to the King and
11 Fry studies.

12 The TSM division of AAP nevertheless
13 recognized that more would need to be done, and
14 because, in the public light at least, a change
15 occurs on January 1, 1978, the feeling was expressed
16 to us by industry related librarians, people who
17 run information centers and by others that if
18 ever we were to do anything, it should be done
19 now and be in place not later than January 1,
20 1978.

21 Consequently, in August of 1976, the
22 AAP/TSM division first addressed itself to the
23 issues in a task force that was composed not only
24 of AAP members, but publishers not members of
25 AAP, and this committee has met a number of times

1
2 since then. Its program has gone through a series
3 of revisions.

4 In February, just six weeks or so ago,
5 it was discussed at length with the Task Force
6 Group on Scientific and Technical Information
7 Communication of the Industrial Research Institute,
8 whose membership consists of many of the 500
9 companies and we received, I should say, sympathetic
10 consideration and many helpful suggestions from
11 them.

12 All of this planning culminated in the
13 following actions which were taken by the AAP
14 Copyright Mechanisms Committee at its meeting on
15 March 10, 1977.

16 The attached program which you have was
17 formally adopted as an action plan with a hoped
18 for target date of January 1, 1978.

19 Counsel was authorized to draft articles
20 of incorporation for a not-for-profit Copy Payments
21 Center.

22 My friend, Mr. Weil, who as you know is
23 connected with Exxon, was retained by the TSM
24 division of AAP to act as a consultant and to
25 attempt to implement this burgeoning program, and

1
2 plans were discussed for a broad program of liaison
3 and explanation directed to other publishers and
4 to the various user communities.

5 I should say that AAP is very grateful
6 to Exxon for allowing Mr. Weil to assist us in
7 the manner that he is, and I should say also that
8 the fact that Exxon has done this and that Mr. Weil
9 has consented to do this is a very substantial
10 token of the indication of the valuation of the
11 importance that both Exxon and Mr. Weil placed on
12 our proposed program.

13 It is important to recognize that our
14 program is not one that is sponsored only by
15 for-profit publishers.

T-2 16 I want to emphasize that this program
17 has been formulated not only by many of those in
18 the for-profit sector but also by not-for-profit
19 professional societies, some of whom, such as
20 the American Chemical Society and the American
21 Institute of Physics are members of AAP

22 I should add also that we have aired this
23 program to other professional societies among whom
24 is CESSE, the Counsel of Engineering and Scientific
25 Society Executives, and we have reason to believe

1
2 that we have at least the tacit approval, not formal,
3 of the publishers of perhaps as many as six or
4 seven hundred of the professional journals,
5 scientific, technical and medical journals, that
6 are published in this country and which, I would assume,
7 constitute a substantial bulk of the providers
8 of the important scientific literature in this
9 country.

10 What about the user organizations, we
11 were asked. Will they find this program suitable?

12 I am not naive enough to believe that
13 we will find unanimity. We have every reason to
14 believe that we will obtain much more than the
15 majority consent of industry-related libraries
16 and information centers and we hope, and we will
17 do our best, to attempt to explain in greater
18 detail our program and to obtain the consent of
19 the library associations as well.

20 As I told you, in February we discussed
21 this in detail with the Industrial Research
22 Institute's Committee, and as I said, we have
23 very sympathetic consideration from them. We have
24 also had the benefit of Mr. Weil's knowledge of
25 how libraries and information centers operate and

1
2 we are using that to the best advantage we can in
3 tailoring our program.

4 I would like to add here that although
5 we call this "our program" and although, as I
6 said, this program was adopted at the March 10th
7 meeting, this is not frozen in concrete. We expect
8 to receive many comments, many criticisms, and we
9 hope to incorporate in our program those which we
10 find practicable and viable.

11 We think that the program that we have,
12 with whatever changes may be made to it, will be
13 as convenient as possible for users, will impose
14 minimal additional clerical expense to users, and
15 we expect that user organizations in the vast
16 majority will willingly comply with the program.

17 We recognize that it is a program that
18 relies in the first instance on the honor system,
19 but like the income tax, which is also an honor
20 system, we understand, of course, that it will also
21 be enforceable at law. It requires little or no
22 record keeping. It permits both in-house copying
23 and access to copies from outside organizations,
24 and it will provide at least some revenue, it is
25 expected, once the thing gets going in full scope

1
2 to balance the detrimental financial effects that
3 copying may have on the journal publishers, et cetera.

4 JUDGE FULD: Will not many individuals
5 in addition to organizations make use of these
6 articles?

7 MR. LIEB: Well, if they do --

8 JUDGE FULD: And how do you enforce this?
9 How do you check on it?

10 MR. LIEB: Thank you for the question.

11 There is one thing I didn't make clear
12 perhaps. First, this is not to supplant fair use.

13 Now, the enforcement and policing of restrictions on
14 copying by an individual or even by an individual
15 organization to determine what copying is fair
16 use copying and what copying exceeds fair use
17 copying is very difficult and, I would concede
18 in many cases, not practical.

19 JUDGE FULD: How do you check on the
20 number of copies or the copying that is made?

21 MR. LIEB: Now, this is a first stage
22 program, and our proposed copy center is a model
23 T Model, rudimentary.

24 Ultimately, when this gets under full
25 sail and perhaps when the Payments Center takes

1
2 on broader duties, very possibly with Congress'
3 approval, at that time conceivably there may be an
4 enforcement arm of the organization. At the
5 moment we are content to --

6 JUDGE FULD: Rely on the users?

7 MR. LIEB: -- rely on the various user
8 communities and, as I said, we have had expressions
9 of willingness to comply by many of those user
10 groups.

11 MR. WEDGEWORTH: I believe I noticed in
12 your presentation that there was a statement which
13 provided for a compliance function for the center
14 and I just want to be clear. Are you suggesting
15 now that that in no way implies initially that
16 this center would have any compliance function?

17 MR. LIEB: Mr. Wedgeworth, that is at the
18 present time. The original thinking was to list
19 a whole series of functions of the payments center.
20 The latest thinking, subject to change, is for
21 the initial stage to reduce the function and
22 initially, at any rate, to have this center operate
23 merely as a mechanical funnel for the receipt of
24 payments, the processing of the information and
25 the distribution of payments.

1
2 MR. WEDGEWORTH: But you do ultimately
3 see that perhaps similar to ASCAP, the center would
4 have a compliance function?

5 MR. LIEB: My own guess is that it would
6 be far in the future.

7 Again, departing from my script and speaking
8 personally, I would say that before I would think
9 that would be a practicable idea, we would first
10 want to feel that we had general public acceptance
11 of the program. We really would not want to send
12 out in the field a lot of posses and drag people in
13 by their heels.

14 I think, and I am speaking for myself
15 now, that over a period of time we would try to
16 explain to users why it was in their interest
17 as well as ours for them to conform.

18 That really finishes my presentation --
19 excuse me?

20 VICE CHAIRMAN NIMMER: I do have questions
21 when you are through with your presentation. I have
22 a few questions.

23 MR. LIEB: Well, I have a few other remarks.

24 VICE CHAIRMAN NIMMER: Fine.

25 MR. LIEB: But I could take the questions now.

1
2 VICE CHAIRMAN NIMMER: I need a little
3 clarification. Perhaps, this was explained before
4 I came in.

5 First, as to that part of your plan that
6 says the publisher can determine the price of each
7 of his items. No. 1, I am not clear, Does that
8 mean that he may also withhold some of his works
9 from the system, or do all of the works held by a
10 publisher go into the system, but the pricing is
11 determined by the publisher?

12 MR. LIEB: To answer your question
13 specifically, we are planning entry not on an
14 organization basis as such, but we are planning
15 entry into the plan journal by journal.

16 Conceivably, although it is ^{the plan is not} likely
17 to happen, if I am a publisher, and if I publish
18 ten journals, I enter nine of my journals in the
19 plan by systematically placing the code on the
20 foot of the first page of each article in those
21 nine journals.

22 If I choose not to enter my tenth journal,
23 I don't place the code on it, and therefore, that
24 is not in the system.

25 Now, the suggestion that we have made to

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1
2 protect the user is for what we have called an
3 umbrella statute, and I will come to that a little
4 bit later, somewhat on the order of what we discussed
5 at the Dumbarton talks, which would in effect
6 encourage a publisher to put his journal in the
7 system because he was being paid for the copying
8 and would discourage him from not putting it in
9 the system because if he chooses to rely on his
10 legal rights to enforce action against infringers,
11 then by statute he would be entitled to a reasonable
12 copying fee and possibly, under certain circumstances,
13 an accounting for profits, but would not be entitled
14 either to statutory damages or to attorney's fees,
15 an approach that is used in the new act in a different
16 context.

17 So, to answer your question, it is
18 not John Jones, a publisher who, because one of
19 his journals is in the system, therefore has to
20 put in all of the journals; he puts them in journal
21 by journal and only by putting in the code.

22 MR. WEIL: I have an additional remark.

23 Also, we understand that some of the
24 not-for-profit societies at least initially may
25 not choose to charge, in which case, they will not



1
2 put a code on the articles and they will not expect
3 to collect.

4 MR. LIEB: Or they may put a code and
5 say zero charge.

6 VICE CHAIRMAN NIMMER: Do you foresee
7 a possibility that some publishers will put a
8 charge that is a very c^{high} -charge and hence would
9 interfere with the purpose of efficient and easy
10 copying?

11 MR. LIEB: Well, Mr. Nimmer, you asked
12 whether I see a possibility. Anything is possible.

13 I think that certainly the responsible
14 members of the industry would know that this would
15 be a foolish course to adopt if only because we
16 have Miss Ringer looking over our shoulder five
17 years out. I think that you must assume that this
18 is a honest, legitimate, sincere effort to handle
19 a very difficult problem.

20 The Whitford Report, which I want to mention
21 in a minute, takes a different approach.

22 We are proceeding, and we prefer to proceed,
23 by a voluntary approach, and its success depends,
24 I agree with you, on sensible cooperation not only
25 by users but by publishers. I would expect that that

1
2 cooperation would be forthcoming.

3 VICE CHAIRMAN NIMMER: I wasn't clear on
4 the nature of the amendment to 108 that you are
5 suggesting.

6 MR. LIEB: All right.

7 VICE CHAIRMAN NIMMER: On page 5 of the plan.

8 MR. LIEB: Well, we are still fuzzy on this
9 and it is offered now only to quiet the alarm that
10 might be expressed at this time by users who might
11 otherwise say, "Well, that's all very well, but this
12 system only permits us to copy articles of the
13 participating publishers, and what do we do when
14 we need to make copies of articles that are published
15 by non-participating publishers?"

16 We wouldn't pretend to say to you today
17 that we have an amendment that we are offering,
18 first because we have not thought it through in
19 all respects and, secondly, because we would not
20 dream of offering an amendment without first discus-
21 sing it in full with our colleagues in the publishing
22 industry and with authors and all others who are
23 interested.

24 All we mean to say here is that in our
25 thinking the objection of the lack of universality

1
2 can be met by a section that could be drawn to meet
3 everybody's satisfaction, which in substance would
4 say, I think, two things. First of all, it would
5 give us the anti-trust protection, that I think we
6 should have similar to the anti-trust protection
7 that is given in Section 118 to public broadcasters
8 and the anti-trust protection that is given to the
9 jukebox and record industry and so on. I think we
10 need that and I hope we will get it.

11 I think that the same section that does
12 that could also provide this feature that I mentioned,
13 which in effect would encourage publishers to join --
14 I don't mean all publishers, and this is one of the
15 difficulties of our program, because it requires a
16 definition of who it is who is to be, if you want,
17 coerced into joining it.

18 We are thinking only of technical,
19 scientific and medical journal publishers, not
20 of a publisher who publishes the poetry of one
21 of Mr. Karp's clients and not necessarily either
22 a business article published by Mr. Lacy's company.
23 We are thinking primarily of journal material and
24 we say for these journals it could very well be
25 that a statute should be adopted which would permit

1 universal copying and which would say in effect that
2 "If you, journal publisher, don't enter the system, then
3 you don't get statutory damages and attorney's fee." e cream
4 on your damage."

5 VICE CHAIRMAN NIMMER: Then you don't
6 get the excess damage?

7 MR. LIEB: Correct.

8 VICE CHAIRMAN NIMMER: I see.

9 MR. LIEB: Sure.

10 VICE CHAIRMAN NIMMER: The whole point
11 is simply to remove the statutory damage.

12 MR. LIEB: If such a statute were desirable
13 and if it were adopted, I think it would be self-
14 enforcing. No publisher is going to go to court
15 for an infringement, particularly for a journal
16 article. On a non-continuing infringement it would
17 cost him a million times literally more than he
18 could obtain from it if he knows there can't be
19 punitive damages.

20 VICE CHAIRMAN NIMMER: Statutory damages.

21 MR. LIEB: Statutory damages and attorney's
22 fees.

23 VICE CHAIRMAN NIMMER: Thank you.

24 MR. DIX: I have a question.

25 JUDGE FULD: Go right ahead.

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1
2 MR. DIX: I don't know whether, Mr. Lieb,
3 you want to go ahead and answer questions or explain
4 further, but I had another observation on the
5 pricing mechanism.

6 Aside from the danger that may be perceived
7 by some users that some publishers will impose a
8 prohibitively high price, there is a certain un-
9 certainty and inconvenience in the operation of
10 the mechanism under this plan as I see it. That is
11 strictly the equivalent of inter-library loan opera-
12 tions. The person who wants a copy will not know
13 what the price is because he doesn't have a copy
14 in front of him. The person supplying the copy
15 will know.

16 One way to avoid this uncertainty and make
17 it simple would seem to me an average flat charge
18 to the purchaser of the copy.

19 Now, the actual distribution through the
20 center might be on the basis of a price fixed by
21 the publisher, but an adjusted price which might
22 do away with inequities, and this determines what
23 one gets for the fifty cents, but I can see certain
24 inconveniences to the whole user group in the
25 mechanism and operating of it.

1
2 I was wondering whether you had rejected
3 the idea of a flat per copy price totally, or whether
4 you still are open on that.

5 MR. LIEB: There are several aspects to
6 that.

7 In the first place, we are limited in even
8 the scope of the discussions we can have about price
9 because of anti-trust considerations, so that we
10 have really pinned our flag on the mast that each
11 publisher establishes his own price, and even there
12 we are uncomfortable and we want some protection
13 for that.

14 It has been suggested that from a publisher's
15 point of view he would find it wise for a particular
16 journal that he published to have a uniform charge
17 for all articles in that journal as distinguished
18 from a separate charge for each article in that
19 journal. It is conceivable that if a publisher
20 has a string of ten or forty journals, each about
21 the same price, that he might establish a house
22 price for all of his journals, but I think that my
23 own guess is that even quite apart from the anti-trust
24 author factors, it is not likely that there could be a
25 uniform price, because when you compare the polar

1
2 extremes of the publisher of a journal having a
3 circulation of fifty or one hundred thousand with
4 a \$25 subscription price and another journal having
5 a circulation of two hundred with a \$250 subscription
6 price, to adopt a mean would put the small fellow
7 out of business and that wouldn't be anybody's
8 purpose.

9 MR. DIX: Again, if there was an averaging
10 function of the center, the publisher might still
11 get his same price, but the cost would be averaged
12 out and would add an element of certainty to the
13 user, I think, that might remove some of the objec-
14 tions to such plan.

15 I haven't thought this through myself.

16 MR. LIEB: Well, that quid pro quo could
17 flow from a broad enough anti-trust section. It
18 could possibly result from a broad enough anti-trust
19 section.

20 JUDGE FULD: Yes, Mr. Miller?

21 MR. MILLER: I just had three questions
22 of technique which I think are related to Mr. Dix's
23 point.

24 I gathered from something you just said
25 that the system contemplates the possibility of a

1
2 publisher quoting differential pricing on an article
3 by article basis for materials in the journal.

4 Would you only contemplate a fixed per
5 article price by a publisher?

6 MR. LIEB: I think the system would be
7 broad enough to accommodate different prices on
8 different articles.

9 I would think from a publisher's point of
10 view that he might very well prefer not to take that
11 option and instead to have a uniform price for each
12 article in the journal.

13 MR. MILLER: Does the system contemplate
14 a differential pricing based on the identity of
15 the user, different rates for certain kinds of
16 institutions vis-a-vis others?

17 MR. LIEB: No, but, and this I didn't
18 mention -- well, I did. It was in the prepared state-
19 ment.

20 The system does not foreclose the possibility
21 or discourage or prevent in any way a user organiza-
22 tion entering into a separate licensing agreement
23 with a publisher, and I would think that that is
24 what would happen. I would think that an organiza-
25 tion which does a lot of copying from the journals

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1
2 of Publishers A, B and C, instead of using this
3 system, would negotiate licenses on a wholesale
4 basis, if you will.

5 MR. MILLER: Does your system contemplate
6 a right in the individual publisher to withhold
7 permission from any particular user, or must all
8 users be served by the system?

9 MR. LIEB: We are a little troubled by
10 that. That is the reason for the insertion of the
11 phrase, "Not for public use."

12 MR. MILLER: That is why I asked.

13 MR. LIEB: We are a little troubled by
14 that.

15 We do want the system broad enough to
16 permit the commercial wholesalers, organizations
17 like I.S.I. and others, which are now in the
18 business of searching out information and providing
19 separates, to be able to use this device, and they
20 would be free to make their customer for their
21 copies pay us the prescribed charge and charge what
22 they want to the customer, or they would be free
23 to go to publisher A, B and C, and say, "Let
24 give this a broader license."

25 What we do not want, and we have not fully

1 articulated this yet, is we certainly do not want to
2 create on the spot republishers, and this is one of
3 the things that bothered Mr. Whitford also in the
4 Whitford Report which I want to mention, so there
5 is a little fuzziness in it.
6

7 MR. MILLER: Could I have just one last
8 question in the sequence?

9 How do you envision the problem created
10 by 201(c) which vests in the distributor to a
11 collected work all rights in the work including
12 reprint rights unless expressly contracted away
13 at the point of publication?

14 MR. LIEB: I now depart from my role as
15 spokesman for AAP and I will answer as an individual
16 lawyer in private practice advising several publishers.

17 I think that publishers of this kind of
18 material will be requiring agreements from contributors
19 to technical, scientific and medical journals which
20 will place the full ownership in the journal publisher,
21 or, if not the full ownership, then the full owner-
22 ship minus certain reserved rights as, for example,
23 the right to make use of it in a text book that the
24 fellow may plan or the right of his or her own organization
25 to make copies for its own use, because I think that

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2 journal publishers as they approach this problem will
3 find it necessary to refuse to accept for publication con-
4 tributions in technical, scientific and medical
5 journals unless they have not only the non-exclusive
6 right to publish in that particular journal,

7 but the right to disseminate
8 that information in whatever medium which will provide
9 the best dissemination.

10 MR. MILLER: You wouldn't be surprised,
11 of course, if I told you that that troubled me in
12 the sense that that type of pressure on authors
13 strikes me as arguably inconsistent with the philosophy
14 of 201(c) and arguably puts the author group at a
15 disadvantage vis-a-vis the publishers, particularly
16 in those disciplines in which the only mode of
17 communications is through a disciplined journal,
18 and which is an access limitation being created
19 on the author group because the author group will
20 have to convey the reprint right as a condition on
21 publication in the base journal?

22 MR. LIEB: Professor Miller, I think it
23 is important in this area of discussion to sharply
24 define the kind of journal that we are talking about.
25 I am talking about basic research journals in science.

1
2 MR. MILLER: Scientific American?

3 MR. LIEB: No.

4 MR. MILLER: Science Magazine?

5 MR. LIEB: No, I am really not talking about
6 them. No, I am talking about the kind of -- well,
7 the Williams and Wilkins -- you know the names we
8 couldn't pronounce in that case. That kind of
9 journal is what we are talking about.

10 The authors of those journal articles
11 are in some cases employed by research institutions;
12 in other cases they are employed by government.
13 They write the article primarily to have the article
14 distributed. The publication of the article is not
15 a mechanical function of the submission of the article,
16 ten pages of script, and then it goes in the June
17 issue.

18 In every case it goes through peer review.
19 Peer review results in most cases in suggestions
20 for change, and as a result of the peer review and
21 the changes that are made as a result of peer review,
22 the article gains a credibility which it did not
23 have before and an acceptability within the scientific
24 community.

25 Now, the author of this article does not

1
2 write the article for pay. Indeed, for the not-for-
3 profit publication, for the societies which publish
4 journals, and they do the bulk of the technical and
5 scientific publishing, indeed the not-for-profit
6 societies get paid. They get page charges.

7 VICE CHAIRMAN NIMMER: But, Mr. Lieb,
8 he may not initially do it for pay. He may later
9 see economic advantages, but the point I would like
10 to ask you about is wouldn't it serve your problem,
11 the 201(c) problem if, instead of doing as you
12 suggest, acquiring all the rights subject to certain
13 reservations by the author, the author simply
14 specifically grants and authorizes the participation
15 in the CPC Center?

16 MR. LIEB: No, not nearly enough. No,
17 not nearly enough, because the intended use of
18 that article is not only reading in the journal
19 and not only copies to form separates, but for
20 inclusion in computer material, for translations,
21 for adaptation to other kinds of --

22 VICE CHAIRMAN NIMMER: Well, that has
23 nothing to do with this problem then.

24 MR. LIEB: Sure, it does. It has to do
25 with the question that Professor Miller asked, which

1
2 is what is the nature of the agreement that the
3 author makes with the publisher.

4 VICE CHAIRMAN NIMMER: I don't want to
5 get into the question of competitive interests as
6 between publisher and author. The only question I
7 think is relevant at the moment is, in order to
8 make this system work, given 201(c), what do you
9 need, and for that purpose wouldn't the specific grant
10 of CPC participation?

11 MR. LIEB: I think at the least -- I think
12 you are right. I think unless the publisher takes
13 this kind of right, he can't grant to others what he doesn't
14 have, that is the way I read it --

15 VICE CHAIRMAN NIMMER: Very briefly, I
16 am still troubled with this individual pricing
17 aspect simply in a system really working well, and
18 I don't think Mr. Dix's suggestion will do it --
19 I don't think -- that is to have a uniform price
20 that the consumer pays, but the publisher can still
21 charge what he wants and that is determined by the
22 division of the proceeds, because wouldn't that be
23 an incentive on the publisher to charge a top amount
24 since he is not faced with any lesser demand on the
25 part of the consumer, it being all a uniform price,

1
2 and hence, all publishers would tend to charge a
3 maximum?

4 I would like to clarify to what extent
5 this aspect of your program is due to a concern of
6 anti-trust considerations and to what extent it is
7 due to what you regard as substantively desirable.

8 If the anti-trust problem could be put
9 to one side, would then the publishers be willing
10 to consider a uniform type pricing?

11 MR. LIEB: I just can't answer that.
12 I mean I could say yes or no or Mr. Harris could
13 say yes or no, but we have really never discussed
14 it because we have never gotten to that stage.

15 But in discussing it, we would have to
16 balance really, I think, and primarily look to the
17 financial requirements and needs of the small
18 publisher. It could very well be that Mr. Dix's
19 suggestion could help him.

20 Then the next question would be whether
21 the publishers of journals with large circulations
22 would be willing to accept that sacrifice.

23 Maybe it is just possible, and I suppose
24 that if this proposal ever gets to the halls of
25 Congress with a bill, that this would be a subject

1
2 that would be debated before the committees.

3 MR. SARBIN: Mr. Chairman?

4 JUDGE FULD: Yes, Mr. Sarbin.

5 MR. SARBIN: I can understand that in the
6 beginning when you are dealing with the kinds of
7 scientific technical journals that you were describ-
8 ing that there is no problem with respect to the
9 author. Indeed, as we heard earlier in the testimony
10 before the Commission, I was surprised to find that
11 authors do pay, since I have so frequently paid --

12 MR. LIEB: Their organizations do.

13 MR. SARBIN: Yes, but as the system develops
14 and becomes acceptable, we now broaden out into a
15 large group of journals. We then encounter, it
16 seems to me, the situation in which the author is
17 being paid, and it worries me that we have created
18 a system in which publishers and others say, "Well,
19 it is just automatic. You give me all that."

20 I recall in the early days when I was
21 involved with the purchase of photographs that it
22 was automatic. We just acquired all rights until
23 the American Society of Magazine Photographers made
24 an agreement which said they felt that they had some
25 residual interests and we could not do that any more.

1
2 I am worried that we begin to accept this
3 idea and that there is an erosion of the author's
4 rights.

5 MR. LIEB: I have two responses to that.

6 First of all, even today in the type of
7 journal publishing that we are talking about, scientific
8 journal publishing, publishers constantly when they
9 are so requested give rights back to the author or the contributor.
10 If he is employed by the X, Y or Z Company, he frequently says
11 that he is not going to make his contribution to the journal
12 unless he gets it approved by
13 his in-house counsel, and frequently house counsel
14 says, "Well, yes, that's all right and we'll give you
15 permission to do it. However, we must reserve the
16 right to make in-house copies." Or, the author says,
17 as I said before, "Yes, you can have rights, but I
18 reserve the right to make use of this in my text
19 book or in my classroom," so it is not a uniform
20 practice even in scientific journals.

21 Secondly, the Whitford Report, which I
22 want to discuss for just two minutes, supports the
23 feeling that I have expressed for a long time, and
24 that is when you talk of journals and books, for
25 example, you are talking of apples and pears. The

1
2 Whitford Report suggests in a blanket licensing scheme
3 that there would be various collection societies, and
4 they suggest that there be a separate collecting
5 society for books and a separate one for periodicals.

6 To get back to your question, it could
7 very well be that what we are attempting to do here
8 would work out ultimately to be a device that is
9 usable, practicable, feasible and acceptable for
10 the kind of periodical we were talking of. It
11 certainly would never be acceptable to the kind of
12 periodical to which Mr. Karp's clients contributed,
13 so this need not be the universe of publishing.

14 MR. WEIL: Again, and this is just a
15 thoughtful possibility, the code system that will
16 be developed will identify the article. It is
17 conceivable that if a magazine which has agreements
18 with its authors -- this is not the part of the
19 business of this thing, but a magazine which has
20 agreements with its authors which entitles them
21 to a royalty on additional copies, that magazine,
22 if it used the system, would be able to identify
23 what the revenue was for the article, and if they
24 had a contract with the author, they would transmit
25 to the author whatever rights he had as to the

royalties. The code would permit it.

It is not part of the initial part of the system in that this doesn't exist for technical, scientific and medical journals, but if a magazine which did have such a contract with authors were to use it, it would be able to obtain from the center the information as to what the copying had been of that article and then transmit to the author whatever the charges were.

JUDGE FULD: Mr. Cary.

MR. CARY: Mr. Weil, you touched upon this. Would the code symbol have any way of identifying the author of the article?

MR. WEIL: No, it wouldn't. I am talking about the code as it exists, as it floats around in a computer.

You would have to go back to that journal and bibliography and look up who was the author. In fact the code probably in its initial digits will identify the journal and then there will be such additional ones which will uniquely identify it. Whether that includes date information or volume or number information, there is a committee of the ^{standards} American National ~~Cancer~~ Institute which has been working

1 on that, but the code itself will be a unique identifica-
2 tion of the article.

3 MR. CARY: Then there will be no problem
4 in getting whatever is due to the author to him
5 through this method?
6

7 MR. WEIL: Correct. In other words, the
8 system would be able to report back to the publisher
9 if the publisher was of a type that needed that
10 information how many copies had been made of what
11 article.

12 MR. CARY: I have a few more questions
13 I would like to ask Mr. Lieb.

14 JUDGE FULD: All right.

15 MR. CARY: In connection with the clearing
16 house concept which you have been describing, how
17 would this be organized? Is it a membership
18 society? Is it a stockholders' type, or is it
19 a part of the AAP?

20 MR. LIEB: Oh, no. Oh, no.

21 There has been no action taken, but we
22 have drafted a certificate of incorporation under
23 the not-for-profit law of New York State. We say
24 in our presentation that the Board of Directors
25 or Governors would include not only journal publishers,

1
2 but users. It would be, as we conceive it, an open
3 group in the nature of a public interest company.

4 MR. CARY: Would it include any authors?

5 MR. LIEB: Well, yes, sure.

6 MR. CARY: How would the Board of Directors
7 be elected, for example? Has that been contemplated?

8 MR. LIEB: Well, I am not being facetious
9 now, but Mr. Karp and I were involved in making a
10 presentation of a non-for-profit company to the
11 public broadcasting people in connection with the
12 talks that we are having with them under Section 118,
13 and we suggested to them that they cooperate with us
14 in the organization of a corporation and participate
15 in the membership of the board, and my recollection
16 is that they preferred not to.

17 Now, that is open. We have no desire to
18 control this. This is supposed to be a mechanically
19 functioning spigot and funnel.

20 MR. CARY: Well, I was thinking that if
21 this is organized something along the lines of ASCAP,
22 for example, I was wondering about the voting. Who
23 is going to vote? Who would have the voting rights?
24 Would it be the publishers? Would it be the authors?

25 Maybe you haven't gone into this.

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2 MR. LIEB: No, we haven't gone into it
3 in that depth, but that is because this organization
4 we are talking of wouldn't have but a fraction of
5 the authority and discretion and the power that
6 ASCAP has.

7 MR. CARY: Would you have any thoughts as
8 to who might be eligible in such organization to
9 be on the various committees of the clearing house?

10 What I am getting at really is are you
11 just going to be a publisher's organization or are
12 authors going to have a voice in this so that they
13 can participate?

14 MR. LIEB: Yes, authors would have a voice,
15 but we are not planning on an organization which
16 would handle works of authors of general works.
17 We are limiting ourselves, as I say, and primarily
18 our target is scientific journal material.

19 But yes, I would assume that there would
20 be a very large representation from the not-for-
21 profit learned societies which, after all, do the
22 bulk of the journal publishing.

23 MR. CARY: Well, would publishers who were
24 not members of AAP, for example, be permitted to
25 participate?

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2 MR. LIEB: Oh, yes, and also, as we con-
3 template it, publishers are not even limited to
4 American publishers. As we see it, any publisher,
5 German, Sweden, Switzerland, could enter his journals
6 in the system.

7 We think, however, that it might not be
8 advisable to make immediate payment to a foreign
9 publisher, but instead to hold the proceeds in
10 escrow pending the negotiations that would be required
11 between the collecting system here and the collecting
12 societies abroad, because that would be a two-way
13 flow for copying of American publications in
14 Europe and copying of European publications in
15 this country.

16 MR. CARY: Well, I share Mr. Sarbin's
17 anxiety about the author, and I can see from what
18 you said earlier about the Whitford Report that
19 you are aiming at perhaps separate clearing houses
20 for these separate groups, which are the not-for-
21 profit type of author and the for-profit type author,
22 and again, I have a little trouble in my mind as
23 to whether, if one organization like you are advocat-
24 ing for this particular type of publication, will
25 set the tone or the pace for all other organizations

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2 that may come in later and, to that extent, may be
3 perhaps detrimental to the author.

4 MR. LIEB: Mr. Cary, that would be a very
5 good reason why there should be represented on the
6 board representatives of interests who have no
7 direct concern with this flow back and forth of
8 scientific material, but who would be concerned
9 that it does not extend to other kinds of material,
10 and I think that would be totally permissible.

11 JUDGE FULD: Mr. Lacy.

12 MR. LACY: I wish to get some information
13 about what the group of technical and scientific
14 and medical journal publishers propose to do as
15 a voluntary action, but specifically of interest
16 today I think would be what it is that you would
17 recommend that this Commission do.

18 Now, our responsibility primarily is to
19 recommend legislation to Congress and I have heard
20 two recommendations thus far, one that the Commis-
21 sioner recommend an exemption from the anti-trust
22 statutes that would be necessary to set up and,
23 second, that the group would be willing to urge
24 Congress to consider a statute that would deny
25 to presumably only the technical, scientific and

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2 medical journals that could be described adequately
3 in the law the right to recover statutory damages
4 and attorney's fees if they did enter into the plan.

5 You mentioned the Whitford Report which
6 has some analogies and obviously some differences
7 with what you are recommending. You will recall
8 that the Whitford Report recommended five specific
9 legal provisions that might be taken, none of which
10 would prescribe the details of the organization
11 or the fees or that sort of thing of a collecting
12 right society which would be analogous to the voluntary
13 payments center.

14 For the benefit of those who may not have
15 the report before them, those five things which
16 the Whitford Commission recommended be included in
17 the British Copyright Act would be (1) that reprographic
18 reproduction would definitely be considered the
19 right of a copyright, (2) that copyright owners
20 would be authorized, anti-trust laws to the contrary
21 notwithstanding, to promulgate blanket licensing
22 schemes in certain defined areas, and (3) that if they
23 did not do so, they had a much more severe penalty
24 than you had in mind. Copyright owners would lose all control
25 over reprographic rights if they did not participate

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2 in the society -- that is, reprographic rights so
3 far as educational established, government department,
4 industry and professional interests, and copying
5 agencies, which is practically everybody -- (4) that
6 each of these collecting societies would have to have governmental
7 approval, so that the report did recognize the possibility
8 of at least two and perhaps others to represent the
9 special kinds of publication, and, finally, (5) that
10 negotiations, including the setting of fees, would
11 be subject to review by a copyright tribunal.

12 Are there any of those that you would
13 recommend in our statute?

14 MR. LIEB: No. We take a much more modest
15 approach. We agree with the statement that the
16 Whitford Committee makes that the answer does not
17 lie in the suppression of new technology. The answer
18 has to lie in the licensing of copying.

19 But we take a much more modest approach.
20 We do not suggest blanket licensing. We do not
21 suggest all works to go into our system. We prefer and we
22 are really committed to the notion that instead of
23 making a world at once, you start where the need
24 appears to be the greatest and try to make that
25 work, and then go to whatever needs there are and

1
2 either develop a different mechanism or modify the
3 existing mechanism.

4 MR. LACY: But there are two provisions that
5 you mentioned, first, the anti-trust exemption and second the
6 possibility -- though I take it this is something
7 that you are willing to see happen and not something
8 that you are pressing to have happen-- the reduction
9 in rights or the elimination of rights to get
10 statutory damages and attorney's fees for materials.

11 On your recommendation on anti-
12 trust exemption, are really informing the Commission
13 of what your plans are rather than making any specific
14 recommendation to the Commission?

15 MR. LIEB: No, we want something much more.
16 If we can have it, we want your approval, your
17 blessing, a pat on the head, a word from you that
18 at least in what we are trying to do this is the
19 right thing.

20 We want encouragement not only for us
21 but we would like to have an expression of encourage-
22 ment from you to promote among publishers who have
23 not been a part of this effort and among user organiza-
24 tions whom we have not reached a feeling that this
25 is the path to pursue at least for this area of

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2 publishers.

3 MR. LACY: Just one other question. You
4 are testifying here this morning solely on this
5 plan. Will there be any other testimony on behalf
6 of AAP about reprography? For example, would you
7 be recommending any change in 107 or 108 or in the
8 committee report that interpret those?

9 MR. LIEB: AAP was asked this question.
10 In our view, there should be no changes at this
11 time in the act except in the two instances that
12 I have mentioned, the anti-trust exemption and
13 a universal --

14 VICE CHAIRMAN NIMMER: Mr. Lieb, you depart
15 from something else in the Whitford Report where
16 the Whitford Report recommends abolition of fair
17 use.

18 MR. LIEB: We don't do it.

19 VICE CHAIRMAN NIMMER: Their feeling is
20 that it will undermine the licensing system. You
21 don't have that feeling?

22 MR. LIEB: Well, we are concerned about it.

23 Let's mark where we are just for the minute.
24 We have guidelines sponsored by you for inter-library
25 exchange. We have guidelines for copying for classroom

1
2 purposes. We have no guidelines as yet for what I
3 would call on-the-premises copying by a library, the
4 copying that a library does on its own premises for
5 its own user.

6 We would be willing and we hope to be able
7 to negotiate such guidelines either through you or
8 directly with the libraries and for a starter we have
9 said in our prepared statement that we would be willing
10 to accept the rule of five in the inter-library guide-
11 lines as the rule to apply also for on-the-premises
12 copying, so that is a big area that is still left
13 open. We still have an ambiguous general statute.

14 JUDGE FULD: Mr. Wedgeworth.

15 MR. WEDGEWORTH: Yes, I just had one
16 question, and I am not sure whether this should
17 be addressed to you, Mr. Lieb, or to Mr. Weil.

18 In looking at this coding structure, am I
19 to assume from your program that you do not contemplate
20 a change in price during the period, for example,
21 during which a journal article would be covered by
22 the CONTU guidelines, where the price will be printed
23 in the journal upon publication? Do you contemplate
24 that that price will not change?

25 MR. LIEB: You mean thereafter in later years?

1
2 MR. WEDGEWORTH: Well, even during the
3 period presently covered by the guidelines for
4 inter-library copying.

5 MR. LIEB: I am not sure I understand.
6 Do you understand?

7 MR. HARRIS: If I understand you, you are
8 concerned that once a price is published for a
9 specific article and that article lives for twenty-
10 two years, or whatever period of time, will that
11 price stand during that period of time? Is that it?

12 MR. WEDGEWORTH: Well, I wasn't taking it
13 that broadly. I am trying to be sure that I under-
14 stand what the code means.

15 You are saying that when a journal article
16 is published subsequent to January, 1978, it will
17 carry a coding. That coding will include, among
18 other things, an identification number for the journal
19 and the price for making a copy of it.

20 My simple question is, does that assume
21 that that price will not change during the period
22 covered by the CONTU guidelines?

23 MR. LIEB: You mean the five year period?

24 MR. WEDGEWORTH: Yes.

25 MR. HARRIS: I can only give a personal

1
2 opinion. I think it probably will.

3 MR. WEDGEWORTH: It probably will?

4 MR. HARRIS: Will stay.

5 MR. WEDGEWORTH: I see.

6 MR. LIEB: You see, we haven't felt free
7 to talk about this. We are under severe anti-trust
8 restrictions.

9 MR. WEDGEWORTH: I understand that, but
10 the price is being set by the individual publisher.

11 MR. LIEB: Right.

12 MR. WEDGEWORTH: You see, it really strikes
13 at the heart of usefulness of putting a price in
14 the article in the first place, because if you
15 don't contemplate that it will remain at that price,
16 why put it in there?

17 MR. WEIL: For a specific article, once
18 that article is priced it cannot be changed. There
19 is no way of changing it.

20 If you are asking will the given journal
21 have the right to change its pricing structure for
22 later years, the answer would probably of course be
23 yes, but once it has priced an article it is priced.
24 There is no way of changing it.

25 JUDGE FULD: Professor Miller.

1
2 MR. MILLER: When we started this morning,
3 I guess my mind had been motivated by the notion of
4 the extendability of your scheme which is why I
5 directed the questions at you, but to the extent
6 you are asking this Commission to put its muscle on
7 your proposal as far as CONTU, I guess I have to re-
8 ask in slightly different form a question.

9 It is not true, is it, that every author
10 in the works published by the journals that fall
11 within the ambit of your structure would be either
12 authors working for hire or governmental workers,
13 that a fair number of them would be poor mouth,
14 down trodden, besmirched academics in the scientific
15 community?

16 MR. LIEB: Can I ask Mr. Harris to answer
17 that?

18 MR. HARRIS: Well, I personally don't know
19 any, but, yes, there would be a number of contributors
20 to the scientific journal who are from the academic
21 community. They are doing research and teaching.

22 MR. MILLER: So, therefore, the structure
23 you are establishing should be evaluated by an
24 outsider at least in part from the perspective of
25 what the impact of this structure will be on the

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2 authors' bargaining position and access to a disciplined
3 journal, and even the academic not working for profit,
4 when he or she does the piece that goes into the
5 disciplined journal certainly is thinking about the
6 integrity and legitimacy of his or her scholarship
7 and wouldn't like to see it commercialized by an
8 industrial user of the reprint right under your
9 structure without having his or her right to refuse
10 that reprint.

11 You see, I am not simply worried about
12 the 201(c) economic power granted to the author.
13 I am worried about what I think is implicit in 201(c),
14 and that is that the author of a piece in a collective
15 work retains certain powers regarding the integrity
16 or the legitimacy of the use of that work, and it
17 troubles me a bit if, as you say, and I couldn't
18 agree with you more, the standard practice would
19 become for the publisher to extract that reprint
20 right in a clause that is boiler plate hidden away
21 in the third paragraph of an otherwise congratulatory
22 letter about your piece being accepted for publication.

23 MR. LIEB: But, Mr. Miller, as I see it,
24 there would be no change in the new practice if
25 the practice that I have suggested is adopted by

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2 publishers of scientific journals. There would be no
3 change from the practice that exists today.

4 One of the big victories that the authors
5 earned under the guardianship of Irwin Karp was to
6 change really the system that prevails today.

7 It is commonly understood, and you won't
8 find cases that say so in so many words, but it is
9 really commonly understood by publishers and I think
10 authors of scientific articles as well that once they
11 contribute that to the scientific journal, it is the journal which
12 controls the rights,
13 and I don't know of any instance when an author of
14 a scientific article has claimed any rights nor do
15 I know of any instance where a publisher of scientific
16 journals had, to use your words, commercialized the
17 article, diluted it or polluted it.

18 On the contrary, the purpose of the
19 publisher of scientific journals is to keep the
20 article from being polluted.

21 MR. MILLER: Well, I would simply say
22 that I know of at least one quasi practioner who
23 has since 1959 been counseling 180 degrees the
24 other way on that point.

25 VICE CHAIRMAN NIMMER: I know a few, yes.

JUDGE FULD: Mr. Weil.

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2 MR. WEIL: Well, this point has already
3 been raised by the editors who are usually academic
4 people of a number of the not-for-profit journals
5 and who, in their practices, exercise control over
6 the number and use of reprints, such as, for example,
7 not permitting 120,000 reprints to be prepared of
8 a pharmaceutical article for use in the commercial
9 vein, and it would be expected that similar controls,
10 and this is again one of the reasons that this docu-
11 ment is not cast, every word of it, in concrete --
12 it is almost certain that similar words to those
13 that were introduced today in that section on the
14 provision for restrictions of general distribution
15 will have to be placed elsewhere so that multiple
16 use of copying would not be to the detriment of
17 the author. It would not be permitted any more
18 than it is right now under the reprint system.

19 MR. LIEB: Judge Fuld, I know that we
20 are running over our time --

21 JUDGE FULD: I would like to shorten this,
22 if you please.

23 MR. LIEB: Yes. Let me say at this point,
24 respectfully, I don't think the point bears on the
25 system that we are talking about.

1
2 I think what it does is to bear on the
3 practice that may develop among publishers and
4 authors.

5 But now wait, you are a scientific author.
6 Let's see what you have, what good the rights are
7 that you would want to reserve. You need the peer
8 review, as I said before, and you need the resulting changes.
9 You are not in a position to go out ; Dr. H. William Koch,
10 various service centers through the country to
11 license them, to make copies of your article.
12 You need the services of the publisher, and the
13 publisher is really providing the service to you.
14 The publisher gains in its circulation, but it is
15 providing the distribution of your article in a
16 way that you could not do for yourself.

17 Well, that's enough.

18 JUDGE FULD: Any other questions?

19 MR. WEDGEWORTH: I just want to say briefly
20 that I think it has been very useful to hear the
21 presentation this morning, but I think that we should
22 in following up on some of the questions recognize
23 that we do need to hear from the users and other
24 groups with respect to similar proposals in terms
25 of the Commission commenting on criteria for design

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2 and other standards that may be appropriate to protect
3 the interests of all parties.

4 MR. DIX: Mr. Chairman, one more question
5 and I think it can be brief.

6 JUDGE FULD: Yes.

7 MR. DIX: I am back again to the question
8 of the ultimate cost to the user. You can see this
9 center as a not-for-profit organization and I presume
10 that means also self-supporting. In other words,
11 the fee charged by the publisher must include a
12 transaction cost of some sort.

13 This has been one of the problems that
14 I remember way back before Dumbarton Oaks and has
15 always been in the background.

16 Will the cost of collection be so much
17 as to make the whole system unworkable? I wondered
18 simply whether you had addressed yourself to this
19 and had more information on the possible estimated
20 cost than we had previously or whether you are
21 just jumping into this.

22 JUDGE FULD: I think you can do that in
23 a memorandum.

24 I notice that Mrs. Linden and Mr. Price
25 had a question. Mrs. Linden?

1
2 MRS. LINDEN: It is not a question; it is
3 a mere statement, if I may.

4 Very briefly, as a private practitioner,
5 I am aware of at least anywhere between 150 and 200
6 journals, closer to 200 journals, that our office
7 represents in which the author is always asked and
8 his prior approval is absolutely required under
9 written agreement prior to giving any rights any-
10 where to anyone, so that I am afraid I have to dis-
11 agree with Mr. Lieb that in the current practice
12 the authors do not have a right, and as purely a
13 private practitioner --

14 JUDGE FULD: Scientific journals?

15 MRS. LINDEN: Exactly, the scientific,
16 technical and medical journal contributions.

17 As a practitioner I would like to go on
18 record that our office proposed to advise a number
19 of publishing clients whom we represent that any
20 clearing house ought to include authors and publishers
21 as part of the organizing and governing group.

22 JUDGE FULD: Thank you. Mr. Price.

23 MR. PRICE: My question relates to inter-
24 library loans. Under the loan exchange, under Section
25 108 and under the CONTU guidelines, the burden is on

1 the requesting library and the supplying library has
2 no way of knowing whether this is the fifth or the
3 sixth or the fortieth article requested by Library X,
4 because the previous articles may have been gotten
5 from some other source, and there are many sources
6 and I don't see how we can treat with this under the
7 system that the AAP is pressing here.
8

9 I would just like some clarification on
10 that matter.

11 JUDGE FULD: Can you answer that in a
12 sentence?

13 (Laughter.)

14 MR. LIEB: Well, I think that it is basically
15 when the library has reason to believe that it is
16 exceeding fair use, it then should pay the fee.

17 MR. PRICE: But it does not have the article.
18 It does not know what the fee is going to be.

19 MR. LIEB: But, Mr. Price, the library
20 that receives the request gets a certification from
21 the requesting library. It depends on that certifica-
22 tion.

23 MR. PRICE: It makes a copy without charging
24 the fee.

25 MR. LIEB: It does it on the basis of a

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2 certification.

3 MR. PRICE: And if it is not certified,
4 then it may charge a fee?

5 MR. LIEB: Well, it does not fall within
6 the guidelines.

7 JUDGE FULD: Thank you very much, gentlemen.
8 You have been very helpful.

9 Our next speaker is Mr. H. William Koch.
10 Dr. Koch is the Director of the American Institute
11 of Physics and an adjunct professor of physics at
12 Queens College in this city.

13 AIP publishes 60 physics journals and
14 Dr. Koch himself has written and published extensively.
15 He is a member of the Board of Directors of the
16 National Federation of Abstracting and Indexing
17 Services, and he is a representative of the Inter-
18 national Union of Pure and Applied Physics to the
19 International Council of Scientific Unions Abstracting
20 Board.

21 He will talk about the publishing and
22 reprint sales activities of the American Institute
23 of Physics and will seek to support the AAP center
24 proposal.

25 Dr. Koch, we are delighted to see you here.

Association of American Publishers, Inc.



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March 31, 1977

PRESENTATION TO THE NATIONAL COMMISSION ON
NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

Association of American Publishers
Michael Harris
Charles H. Lieb
Ben Weil

We appreciate this opportunity to appear before you today to describe the AAP/TSM Copy Payments Center program.

In our presentation to you on January 14, 1977, we previewed the AAP's evolving program to help meet user demands for copies of the technical-scientific-medical (TSM) journal articles needed to supplement journal subscriptions, but not available under fair use principles or within existing CONTU guidelines. Today, we are happy to be able to report in some detail on a program that is already acquiring broad assent from TSM journal publishers, that has accommodated suggestions from a responsible industrial-users group, that will be widely exposed for comment to other users and publishers, and that is being implemented through appropriate initial staffing. We earnestly invite your comments, and your assistance in assuring the success of this vital program.

The specifics of this AAP/TSM program are contained in the attached document, a "Program for the Provision of Technical-Scientific-Medical Journal Articles and for Related Information-Service Copying." In principle:

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1. This program calls for the establishment of a Copy Payments Center, a not-for-profit organization through which user organizations, including libraries and information services, may pay centrally for their journal-article copying that exceeds fair use or the CONTU guidelines. This will relieve participating users of the necessity for obtaining individual licenses from the publishers involved, and for paying individually to them.
2. Fees for this user copying will be established individually by each journal publisher. Beginning with their 1978 issues, each participating journal will publish its specific-article copying fees on the first pages of articles for which such fees are required, along with a standardized code that identifies the article and hence the journal publisher. Where they also require repayment of copying fees for in-copyright articles prior to 1978, individual publishers may state these in lists to be published by the Copy Payments Center.
3. Participating users, and any organization supplying copies to others may register with the Copy Payments Center, receive their appropriate organizational code(s), report their copying in one of several ways, and pay for this copying, possibly either through the use of pre-purchased stamps, through charges against deposit accounts, or otherwise. Reporting can be as simple as providing an extra copy of the first page of each article copied, marked with the user's organizational code, or

as sophisticated as providing a computerized record of copying transactions (article codes, corresponding copying fees, and the user's organizational code).

4. The participating TSM publishers may also continue to license others to sell and quickly provide separates of articles not available locally; alternatively, organizations may supply such copies without a license by paying the stated-on-the-articles or listed fees through the Copy Payments Center. If this system does not prove adequate, we could consider the establishment of print centers that could serve as centralized facilities capable of responding more quickly to requests for copies of copyrighted materials.

As stated in the attachment, the participation of TSM journal publishers in the initiation of this program is on a voluntary basis, and the chartering of the Copy Payments Center and other steps in this program may require Department of Justice clearance. However, to improve the universality of the system we would favorably consider an umbrella statute which would protect users by permitting reasonable copying ^(not for public distribution) of TSM-journal articles published after December 31, 1977 that do not bear the code, subject to the right of the non-participating TSM publisher to collect a reasonable copying fee, but not statutory damages or attorneys fees.

At the January hearing some of you asked: What about other types of journals? As the attached program statement attests, we are well aware that demands exist for the provision of separates of other copyrighted short documents, such as items in other scholarly, business, and trade periodicals. But

we make it clear that the publishers of any or all of these -- of any periodicals -- can immediately participate in the current program by placing the proper coding on the first pages of their documents. Our program places emphasis on technical, scientific, and medical journals because we know that they form one of the heaviest areas of demand for article copies, and because it has been the TSM Division of AAP that has taken the leadership in formulating this program. Exclusivity is neither intended nor involved. Universality will be a goal if it proves practical; cooperation with others if it does not.

We have been asked why we have waited until now to initiate this program. The answer of course is that we have sought cooperation from the user groups rather than acting unilaterally. Here we believe that some chronology is in order because the TSM publishers have been working for years to serve journal users optimally. Most recently:

1. In 1971-72 several TSM publishers joined author and library association representatives in the "Cosmos Club" negotiations, the first serious discussions in some years on the provision of separates as well as subscriptions.
2. In 1973 we similarly participated in the "Dumbarton Oaks" talks, some of whose principles are embodied in our present program -- codes for articles and copying fees, a single agency for billing and payment, and distinguishing between fair-use copying and copying in excess of fair use.
3. In 1974 and 1975 we participated actively with authors, librarians, NCLIS, and the Register of Copyrights in the Conference on Resolution of Copyright Issues, and in its

committees and working groups. As you know, these discussions were the prelude to the ongoing King Research studies, which you, NCLIS, and NSF are sponsoring.

4. In 1975 and 1976, during the evolution of the new copyright law, both book and journal publishers joined with authors in the defining of guidelines with educators as to the appropriate fair use of photocopies for classroom purposes. And under your auspices, publishers and authors also agreed with library associations on the present CONTU-guideline boundaries for requests for photocopies through inter-library transactions involving journal articles published within a five-year period from the date of the request.
5. In February 1976 we jointly sponsored a forum on copyright clearinghouses with the Information Industry Association.
6. Also, as you probably know, some TSM journal publishers are serving on the advisory committees to the King and Fry Research studies.

Nevertheless, the TSM Division of AAP recognized early in 1976 that all this would not be enough -- that the imminence of the passage of the copyright revision bill called for concrete planning by journal publishers if journal users were not thereafter to be seriously inconvenienced or cut off from vital internal programs in which separates of articles play an important role. Accordingly, the first meeting of an AAP/TSM Copyright Mechanisms Committee was convened on August 18, 1976, to address these issues -- a committee composed of TSM journal

publishers both within and outside the AAP membership. This Copyright Mechanisms Committee has since met seven times, two of these meetings jointly with the Information Industry Association's Clearinghouse Task Force. It has appointed and received preliminary reports from subcommittees on article coding and reprints. In February 1977, representatives of both the AAP/TSM Committee and IIA's Task Force presented and discussed the evolving program at a special meeting of the Industrial Research Institute's Task Group on Scientific and Technical Information Communication, and received many helpful suggestions.

All this planning culminated in the following actions by the AAP/TSM Copyright Mechanisms Committee at its meeting on March 10, 1977:

1. The attached "Program for the Provision of Copies of Technical-Scientific-Medical Journal Articles and for Related Information Service Copying" was formally adopted as an action plan, with January 1, 1978, as the operational target date.
2. Counsel was authorized to draft articles of incorporation for a not-for-profit Copy Payments Center.
3. The appointment of Mr. Ben H. Weil as Program Director to implement the Copy Payments Center Task Force program was officially confirmed, along with a schedule for his operations. These include the drawing up of operating specifications for the Copy Payments Center and the solicitation of bids from qualified organizations.
4. Plans were discussed for a broad program of liaison and explanation with both publishers and users.

It would be inappropriate not to mention that Mr. Weil's availability for this assignment reflects both his own evaluation of the importance and creditability of this program and the seriousness with which his regular employer regards the need for its success. AAP is indeed grateful to Exxon Research and Engineering Company for arranging for AAP's employment of Mr. Weil for this assignment.

It is important to recognize, here, that this program represents the combined efforts and support of both for-profit and not-for-profit TSM journal publishers. Many in both groups are members of the Association of American Publishers and its TSM Division, such as the American Chemical Society and the American Institute of Physics, but others have joined in both the planning and desire for implementation. We expect to receive the support of CESSE, the Council of Engineering and Scientific Society Executives, whose member societies publish 153 important scientific and technical journals.

We could go on, but I believe that you will concede that we are both serious and time-schedule motivated.

What about the user organizations to which the program is primarily aimed? Will they find the program suitable? We think so. We had meetings early-on with representative industrial librarians from both small and large libraries. In February, as mentioned, the program was intensively discussed with the Industrial Research Institute's Scientific and Technical Information Communications Task Group. We have also had the benefit of the IIA's know-how in this area, and we have considerable confidence in Mr. Weil's information-systems experience. We believe we have designed a program that will be as convenient as possible for users -- one that will impose minimum additional clerical burdens,

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but we are already embarking on an extensive program of presentations and explanations that should wear off other rough edges.

As to why we believe that user organizations will comply with this program, we believe that it will afford a relatively simple and straightforward way for article-using organizations to operate effectively within the copyright law. It is in the first instance an honor system, but of course will be enforceable at law. It requires little or no record keeping. It permits both in-house copying and access to copies from outside organizations. And, hopefully, it could provide some needed revenue to publishers to balance any effects on journal subscriptions.

We are obviously enthusiastic about this program -- certain that it is needed, and confident that it will develop efficiently and effectively. We solicit your support and cooperation, and stand ready now to try to answer your questions.

Attachment



March 17, 1977

**PROGRAM FOR THE
PROVISION OF COPIES OF TECHNICAL-SCIENTIFIC-MEDICAL JOURNAL ARTICLES
AND FOR RELATED INFORMATION-SERVICE COPYING**

**Prepared by the
Association of American Publishers
TSM Copy Payments Center Task Force**

This program has been developed to help to meet user demands for copies of the journal articles needed to supplement their journal subscriptions but not available to them under fair use. It has also been designed to help to promote vital journal-publishing continuity. While the initial system is not a universal one, in that it places emphasis on articles in TSM (technical-scientific-medical) journals (because of the strength of demands in this area and the orientation of those involved in planning this program), efforts will quickly be devoted to expanding the program to provide copies of other short documents, or to assisting those primarily involved in developing related programs.

I. PUBLISHER PROCEDURES

1. Initiation of the Program

Individual publishers of TSM journals (or of other journals and periodicals desiring to use the system) will indicate their participation in this program by appropriately publishing on the first page of each article for which they require a copying fee a standardized code* that identifies the article (and hence the publisher) and that states the specific article copying fee. Where they also require payment of copying fees for in-copyright articles that predate this coding, the individual publishers will follow the listing procedure described in the next section.

2. Establishment of a Copy Payments Center (CPC)

As many as possible of the publishers of TSM journals, both for-profit and not-for-profit, will immediately join on a voluntary basis in the chartering, implementation, staffing, and operation of a not-for-profit copy payments center (CPC), to collect the fees for the copying of copyrighted TSM journal articles which each publisher individually sets and prints on the first page of his journal articles. The CPC will distribute these fees (less a charge for processing) to the specific journal publishers identified in stated-on-the-article codes. It is intended that these activities be operational by the target date of January 1, 1978, subject to any necessary Department of Justice or legislative clearance which it may be appropriate to obtain.

The CPC will also collect and distribute pre-system copying fees for the copying of copyrighted journal articles published prior to January 1, 1978, when the specific participating journal publisher has recorded his journal title and pre-system fees with it in a manner that permits CPC-publication and distribution to users of appropriate lists of journal titles and their pre-system fees.

Users will be among those represented on the board of directors of the CPC.

3. Direct Licensing or Establishing of Print Centers

Participating TSM journal publishers and other publishers who join in using the system retain the right to license

others to sell and quickly provide separates of articles. Others also may elect to supply such copies to users without a license by paying the stated-on-the-article or listed fees through the CPC.

If it is discovered that other organizations do not successfully meet user demands, the possibility of establishing cooperative print-supply centers or other supply mechanisms could be explored, provided any necessary antitrust protection would be available for the cooperative effort. Again, under such a system, each TSM publisher would establish his own individual pricing.

4. Codes and Other Standards

Wherever possible, the codes, journal titles and abbreviations, and other indicia established in ANSI/Z39 standards will be used in this system, or employed when developed. Assistance will be rendered ANSI/Z39 where feasible.

For use in this system, an article-identification code will immediately be established (preferably that specified by ANSI/Z39, Subcommittee 34, if it is immediately available), one that will permit computer identification by the CPC of the specific publisher and also provision by the CPC to the

publishers not only of payments but also identification of the specific articles copied and the individual numbers of such copies. This code will also require a direct statement in U.S. currency of the fee required for copying. The code(s) appearing on the first page of each article must be eye-readable and (eventually) machine-readable. These codes and any copyright notice must appear clearly on the record copies as well as on all copies distributed to users.

5. Copying Fees

Each individual publisher will set his own individual article-copying fees (if any). The publisher of each journal will retain the right to establish whether or not a given article or other journal document (news story, "Note," editorial, etc.) will or will not carry a copying fee, and what any fee will be.

6. Fair-Use and Related Copying

TSM and other publishers and the CPC itself will promptly attempt to establish voluntary guidelines jointly with authors and library associations for the fair-use copying that will not require the payment of fees. Pending the development of such voluntary guidelines, publishers interested in the CPC-based program have generally indicated that they will accept as fair-use copying* either the on-site making or the requesting from another library of the number of copies (and under the

*For participating-user organizations

conditions) spelled out in the CONTU guidelines for "Photocopying--Interlibrary Arrangements."

7. Universality of the System

Congress will be urged to consider an appropriate umbrella statute as an amendment to Section 108 of the copyright law, such that reasonable copying ^(not for public distribution) of TSM articles published after December 31, 1977, that do not bear the code could be undertaken, subject only to the right of the non-participating TSM journal publisher to collect a reasonable copying fee.

To assist users and to promote the growth of this system, the CPC will publish before the end of 1977 a list of the publishers and their journals who are participating or have so far indicated that they will participate in this program, and it will publish similar lists as often as needed.

The participation of foreign publishers publishing journals abroad is being given special consideration. Reciprocal arrangements may need to be negotiated with corresponding foreign payments centers.

Because demands exist and will grow for the provision of separates of other copyrighted short documents, such as items in other scholarly, business, and trade periodicals, the publishers of any or all of these can immediately participate in the current program by placing the proper indicia on the first pages of their documents. Following the initiation of the program, the CPC and publishers of TSM journals will attempt to study these related

needs, and to assist all involved in their solution by evolution of the initial mechanism or by separate ones.

II. USER-ORGANIZATION PROCEDURES

1. User-Organization Registration

User organizations will be asked to register their intent to participate, and their billing addresses, etc., with the Copy Payments Center (CPC), in order to facilitate payments. The CPC will then issue to such participating-user organizations their appropriate organizational code or codes, preferably those (if any) established in appropriate ANSI/Z39 standards. Failure to register will not exempt users from the obligation to pay.

2. Reporting and Paying for Copying

Alternate mechanisms will be established for reporting and paying for CPC-based copying. The following seem to have merit, although it may not be possible to afford all of them initially.

- a. User organizations desiring to pay in advance, to avoid keeping internal records against later billings, may use stamping meters (leased through the CPC or otherwise obtained) to print the coded price on the first page of each photocopy of an article. Alternatively, a participating user may buy from the CPC or a designated agency adhesive stamps in appropriate denominations for affixing to the first page of each photocopy of an article.

Both the meter and the stamps will also bear the appropriate organizational-copier code or this must be written on by the copier.

- b. User organizations not wishing to employ these stamping methods, wishing to pay after reporting, and not wishing to employ computerized reporting must make and send in to the CPC an extra photocopy of the first page of each copy of a photocopied article, marked with the appropriate organizational-copier code. Alternatively, for multiple photocopies of a single article, the user organization may make one extra photocopy of the first page of the article and write in large letters at the top the number of copies made; e.g., "10 Copies." The appropriate organizational-copier code must also be written on.

- c. In general for reporting to the CPC, and for its use for its records and distributions, participating-user organizations will be required either: (1) to make (and periodically send the CPC boxes of) an extra photocopy of the first page of each of its article photocopies,* or (2) periodically to send

* Including all fair-use and related copies made or obtained. User organizations using stamping meters or adhesive stamps could, for example, stamp fair-use copies with \$0.00.

to the CPC an appropriately-prepared computerized record of the article codes and copying prices for each copy of a TSM or other article copied or obtained.* User organizations not employing the prepayment alternatives will be charged against a deposit account or billed directly.

- d. Except for public-type libraries, user organizations must devise effective internal systems for collecting and identifying record copies of copyrighted articles made by individuals at unsupervised machines, in order to pay for such copying. The CPC will supply appropriate phraseology for instructional posting by each such unattended machine.

* Including all fair-use and related copies made or obtained. Entries for these fair-use copies could be appropriately tagged.

STATEMENT OF

DR . H. WILLIAM KOCH

DIRECTOR

AMERICAN INSTITUTE OF PHYSICS

DR. KOCH: Thank you, Mr. Chairman.

Ladies and gentlemen:

I am very pleased to come here. I have asked Mr. Robert Marks, who is head of our publishing operation at the American Institute of Physics, to sit at my side and help field some of the questions that are obviously going to come from you.

I have prepared a statement that I think all of you have copies of. That statement is marked "Final" in the upper right-hand corner.

I notice also that there are some copies that are marked "Draft" in the upper right-hand corner. There are differences between the two and I wish that you would only use the one that is marked the most prestigious

I prepared the earlier statement in haste and it was typed while I was in California and I didn't see it when it went out, but I wanted to provide it to you ahead of time so that you would have some advance warning of the kinds of things that I plan to say.

1
2 What I plan is to give you some views of
3 the particular characteristics of our publishing
4 operation, and I think it is important that you
5 get that perspective because it is quite different
6 from the perspective of a commercial magazine, for
7 example, in quantity, in size and involvements of
8 authors that was continuously addressed in the
9 series of questions that came up earlier.

10 I want also to be supportive of the plan
11 that is being developed cooperatively with the
12 Association of American Publishers, but I also
13 want to demonstrate to you that I cannot do this
14 in a formal way.

15 Our governing board of the American
16 Institute of Physics is going to meet in the
17 next two days. Indeed tomorrow we are having
18 a seminar that will have participating in it
19 Mr. Ben Weil and Mr. Charles Lieb, so ^{the most prestigious}
20 Board is going to review for the first time in depth
21 our general plans and proposals to them, and then
22 Friday night and Saturday they plan to take some
23 initial actions.

24 I do not know what they plan to do regarding
25 the copy payments center. I do not know what they

84-94

1
2 plan to do regarding transfer of rights from authors,
3 but we have made proposals to them and I hope that
4 they will act favorably on them.

5 By way of giving you a background, in
6 order to more completely understand indeed the
7 Copy Payments Center that has just been described,
8 let me refer you to the document marked "Final,"
9 that I have given to you, and I am going to take
10 the basic material there and then amplify it by
11 holding up some objects that obviously are scientific
12 journals.

T-5 13 On the second page of the final document
14 given to you, I refer at the bottom of the page to
15 the fact that the American Institute of Physics
16 and its nine member societies publish over 100,000
17 pages per year.

18 In order to give you some perspective of
19 what 100,000 pages per year means, I ^{the most prestigious}
20 important that you know that those 100,000 pages,
21 for example, represent some 90 percent of what is
22 published in the United States by United States
23 physicists. Most United States physicists belong
24 to one of our nine member societies.

25 In addition, we publish some twenty

1
2 translation journals where we translate cover to cover
3 the Soviet physics journals and we translate about
4 one-half in pages, but the most significant one-half
5 of the pages that are published in Soviet journals,
6 and that is what is included in the 100,000 pages.

7 Further, by way of explanation, you realize
8 that when you have what we have, we have just installed
9 a high speed computer control typesetter, and this
10 high speed typesetter can generate and compose pages
11 at the rate of three pages per minute, and if you
12 take that kind of speed, you say how long does it
13 take to compose 100,000 pages and you are talking
14 about two and a half hours per day every working
15 day during the year. Well, that's a lot of pages.

16 However, if you then ask the further
17 question how many people subscribe to these pages,
18 and I have a list here of approximately forty
19 journals for which I have the data and some of
20 the most prestigious journals, specifically the
21 Physical Review, has some 3,000 non-member
22 subscribers, libraries and some 1,600 or 1,500
23 member subscribers.

24 I emphasize this because someone asked
25 before, "Do you have a differential pricing?" Yes,

1
2 we have a differential pricing. We do price for
3 members and we price for non-members. The members
4 pay dues and they participate in our whole process,
5 the non-members do not, we have a variable pricing,
6 and we would expect conceivably the governing board
7 will establish variable pricing as well on these
8 copies that are going to be sold via the Copy Payments
9 Center. I would suspect that there will be a single
10 copying fee that will be returned by the copying
11 center to the American Institute of Physics, but
12 we can sell directly the actual article and we
13 can charge different prices to different kinds of
14 users, different kinds of subscribers.

15 That is the second point I wanted to make
16 regarding our 100,000 pages.

17 The number of subscribers, even though it
18 represents the corps of United States physics, does
19 not go to a large number, not hundreds of thousands
20 or millions kinds of subscribers. It goes to almost
21 people that you can count on your fingers. The
22 numbers are small.

23 Further on in this prepared statement I
24 refer to the standards that we have developed, and
25 the subscription rates as being low. It is our

1
2 intent in the future to accomplish the widest possible
3 dissemination of physics by, yes, making subscriptions
4 low, yes, by maintaining article charges, ^{by making} /copying
5 fees low in order to get the dissemination broad.

6 We would intend also to work with a variety
7 of mechanisms. We have already licensed the National
8 Technical Information Service to make copies of any
9 article in any one of our journals, and I went to
10 each one of our societies and said, "Will you give
11 me permission to give that permission to the National
12 Technical Information Service?" We have done that
13 and we expect that if there is a national periodicals
14 library established, if there are commercial centers
15 established, we would plan, and the copying payment
16 center plan accommodates to that, for a publisher
17 to license directly from centers if we so wish to
18 or work from the Copy Payments Center.

19 There are some other things about the
20 journals. Here (indicating) is one of those
21 journals, the Journal of Applied Physics, that is
22 owned by the American Institute of Physics. It has
23 over one hundred articles in this issue.

24 But let me tell you what is happening in
25 the habits of physicists. The member subscriptions

1
2 in the last eight to ten years to this journal have
3 gone down by a factor of two. The non-member sub-
4 scriptions as well have gone down, but the member
5 subscriptions have gone down by a factor of two.
6 Increasingly members are concerned about the size.

7 Here (indicating) is a monthly issue and
8 their interest involves perhaps several articles
9 in this issue. Why should they store that issue?
10 Why should they pay for that issue even though our
11 price per page is very low? They would like to get
12 a particular article, and we sell copies of individual
13 articles and we see that that is the kind of phenomenon
14 that is occurring. They are Xeroxing, photo-
15 copying, in their libraries and we encourage that.
16 In fact, we want to encourage it in the future or
17 they will be buying copies from commercial services
18 around the country.

19 These are the first mechanisms that we
20 hope to encourage and I want to emphasize here,
21 therefore, that in the past the principal mechanism
22 for physicists to get their material was by means
23 of the research journals that we have published.
24 In the future I hope that there is going to be a
25 whole spectrum of techniques for single copies.

1
2 Within the next two years the American Institute of Physics will,
3 for example, have the full text of all of its journal articles
4 available in computer-readable form. Page proofs returned from authors
5 could also be included in that computer store, and we could give
6 permission, if we wanted to, to reproduce selected articles even
7 before the journals were produced. This is one of the new
8 mechanisms being developed.

9
10 I am delighted indeed at the final passage
11 of the copyright law because I think this will now
12 break the log jam in the whole communication business
13 in that it now makes it possible for people to know
14 what the rules are and of course, we and others are
15 going to comply with those rules and try to work
16 with the procedures that have been developed in the
17 past and established by law, and hope to modify and
18 accommodate to that in the future.

19 Many of those procedures we propose to be
20 exactly what we have had in the past.

21 We have also assumed that we had the right
22 to represent authors. In my negotiation with the
23 Soviets on translation rights to our journals, they
24 had not interfered with that. We have not consulted
25 them individually. We assumed we had those rights and

1. we have operated that way. We had negotiated with
2 various organizations and we have assumed this.
3 However, we are always very mindful of the needs
4 and the involvements of individual authors.
5

6 If there is a use proposed, an ad hoc use,
7 in a reprint book, for example, we consult the
8 authors regarding that use before we give permission,
9 so, in a sense we represent the authors. Indeed,
10 I say in this statement:

11 "Scientific societies as publishers have
12 traditionally not been much concerned with
13 copyright. Usually it is assumed, with
14 varying degrees of formality, that the
15 process of peer review and eventual
16 acceptance for publication, which every
17 article in a journal issue must undergo,
18 is sufficient to give the society the
19 right to the copyright of the issue and
20 each of its articles. In a very real sense
21 the authors collectively are the society,
22 so it is perfectly natural for the society
23 to represent the authors' interest in market-
24 ing, sales, permissions, and other aspects
25 of the journal dissemination process."

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2 We are very careful to make sure that we
3 consult them when their particular article is involved.
4 Often there may be an addendum, a correction indeed
5 to a particular article. An author may feel that
6 his work that is going to be proposed to be used in
7 a reprint book should not be used, that a subsequent
8 article should be used, and that is why the authors
9 are involved, and indeed they are our society. They
10 do determine our policy.

11 Well, I am aware that the time goes on and
12 I just want to make one principal point, if I may,
13 and then wind it up so that we can entertain questions
14 and discuss the view of the scientific society
15 publishers.

16 The points that I want to refer to now are
17 on page 8, and they deal with abstracts. Let me
18 just summarize what is here. It bears on this
19 computerization that I referred to.

20 Currently, you see, we have tapes of
21 abstracts. Presently, tapes of abstracts have not
22 really found their role, in my view. Physicists
23 do not use them to any great extent, partly because
24 the conventional tape of an abstract produced by a
25 conventional abstract indexing service is three or

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1
2 four months late. It comes out after the journal
3 comes out.

4 We produce a tape that comes out simultaneously
5 with the journal, and what we want to do is to have it
6 be characteristic, that you can get single copies
7 of articles in cover to cover journals; and on the
8 computer tape more and more you will be able to not
9 only get just the tape of abstracts but you will have
10 access to the whole article if that is what you want.

11 We indeed are involved in some experiments to
12 examine the potential there, but I want to make a
13 point that tapes of abstracts are the first part of
14 this computerized society that we are in and tapes
15 of abstracts are already demonstrating some problems
16 in the copyright of our foliolization simply because
17 the primary publishers have always been consistent
18 regarding the requesting of permission from one another
19 to use an excerpt, or a paragraph and in
20 another article, for example; or, if a full article
21 is used in a reprint book. There are always permis-
22 sions involved there.

23 The secondary services, the abstract and
24 indexing services, have taken over the years what-
25 ever technique they had available to them, author

1
2 prepared abstracts in many cases, and they have in
3 other cases rewritten abstracts of articles. We are
4 concerned about that consistency. We are concerned
5 particularly about the question of computer tapes
6 of abstracts.

7 Let me conclude by reading to you the
8 real issue of concern here, and this is on page 9
9 at the bottom of the page:

10 "Probably the more important issue with
11 respect to abstracts is the copyright-
12 ability of a computer tape of abstracts.
13 Such tapes are now commonplace and are the
14 first stage, as I have already indicated
15 is the situation at AIP, to computer tapes
16 of the complete journal. It is our position
17 that both the tapes of abstracts and of
18 journals must be protected by copyright
19 just as are the printed abstracts and
20 journals. Presumably such protection is
21 to be provided at the input of a computer
22 system and will result in licensing arrange-
23 ments as there are copyright protection
24 and licensing arrangements for the use of
25 the printed journals in any marketing and

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1 distribution system."

2 During the question period this morning
3 I noted down some points
4 just to see whether you want to ask me questions
5 on these points regarding variable pricing, regarding
6 transfer of rights, regarding what the fee is that
7 we expect to get from a Copy Payments Center, and
8 what the prices would be for articles that we would
9 sell directly.
10

11 Bear in mind that I cannot answer specifically
12 questions of prices because of the cautions that have
13 already been evident, but there are some obvious limits
14 and obvious parameters within which questions are acceptable

15 and I can respond to those because it is
16 obvious that they are in the public domain. I
17 would conclude here, therefore, and say, thank you
18 again for the opportunity of presenting these views
19 to you.

20 Are there any questions?

21 MR. FRASE: Would you go briefly into your
22 talk about pricing and then after your board has
23 acted, let us know what they have decided with
24 respect to policy?

25 MR. KOCH: Well, the only thing I would

1
2 like to say about the pricing is to sharpen up
3 perhaps some of the prices that are involved.

4 One of the prices, if you want to call
5 it that, that is involved is this copying fee.
6 A copying fee is the magnitude to be printed on
7 the first page of the journal article.

8 Now, that fee will come via the payments
9 center or it could go directly to the publisher, but
10 for the organization that is making the copy of the
11 article, the reprint center will charge their own
12 magnitude in addition to their copying fee.

13 Suppose that a reprint center charges five
14 or six dollars, and I know that that is the kind of
15 magnitude that they are charging and have charged
16 in the past and propose to charge in the future. The
17 copying fee would be tacked onto that magnitude of
18 money, and if we were to take an article and say the
19 copying fee is two dollars, two dollars is what is
20 going to go in the article and the customer will have
21 to pay the two dollars plus the base fee of the
22 copying center of, say, five or six dollars.

23 Now, the copying fee therefore is one
24 consideration. Another consideration is what would
25 we sell the article for directly? What do we sell

1
2 them for now?

3 We sell copies of articles now and we charge
4 not by the article but we charge by the page, twenty-
5 five cents a page and I would expect that in the future,
6 even though we may agree to a flat rate per journal
7 copying fee to be stamped on the front page of each
8 article that is not necessarily proportional to the
9 kind of charge we would make when the article was
10 sold directly by the American Institute of Physics
11 to a customer, we would probably continue to charge
12 twenty-five cents a page, but that is the charge we
13 make now.

14 I don't know what it is going to be in
15 the future, but there is a guide and I think it is
16 important that you know that the copying fee and
17 the price per article sold directly by us may
18 conceivably be quite different.

19 Bob Marks reminds me that the reason for
20 this twenty-five cents an article is that it is
21 more proportional to the kind of cost that we have.

22 JUDGE FULD: Twenty-five cents a page?

23 MR. KOCH: Twenty-five cents a page, sorry,
24 and therefore we can accommodate to articles that
25 are of any length.

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2 That is the problem, of course, with a
3 fixed price per article, because the articles are
4 quite non-uniform in size. In the case of a physics
5 journal, although the average size of the article
6 is seven to eight pages, some of these articles
7 you see in review articles may go up to one hundred
8 or two hundred pages, and yet, the copying fee that
9 we would receive if we go into this arrangement
10 would be uniform for all those varying length articles.

11 JUDGE FULD: Mr. Cary.

12 MR. CARY: Mr. Koch, if you go into this
13 arrangement which you have just mentioned and you
14 get this fee which you have specified, how is this
15 going to be used? In other words, who gets the fee?
16 Is it the institute that gets it or does the author
17 get any part of that?

18 MR. KOCH: Let me explain first why a fee.
19 May I do that, and then I think I can get the answer
20 to your question?

21 MR. CARY: Yes.

22 MR. KOCH: I said to you that this journal
23 has had a decrease in member subscriptions by a
24 factor of two. As their habits are changing the
25 members are subscribing less and less and getting

1
2 their information some other way, by photocopying
3 machines or what have you.

4 As the subscriptions go down, we hope
5 to replenish that loss in income by income from
6 other services that are based on the same basic
7 material that is in here, so that we would be able
8 thereby to cover the basic costs that we have.

9 If we cannot cover those basic costs,
10 as the number of subscribers goes down the sub-
11 scription price would have to go up and that would
12 make the number of subscribers even less. In order
13 to continue to publish journals we need extra sources
14 of income.

15 Some of our officers have not yet accepted
16 that fact, but it is a fact.

17 MR. CARY: The income then would go toward
18 the sustenance of the journal itself?

19 MR. KOCH: In the case of our operation,
20 where it is similar to the American Chemical Society,
21 the American Chemical Society has had in their bylaws
22 a statement that it is assumed when an article is
23 processed by the American Chemical Society that the
24 American Chemical Society has complete copyrights
25 to the articles that are involved in their journals.

1
2 We have not specifically stated it, but we
3 have worked under that assumption in the past and I
4 would suspect that we will be working that way in the
5 future.

6 MR. CARY: Are all of your authors of the
7 not-for-profit type?

8 MR. KOCH: Yes, they are.

9 I should qualify that. We do have a few
10 review article journals where there are some honoraria
11 that are involved, but by and large when you are talk-
12 ing about research journals, the research articles
13 are all of the not-for-profit type.

14 JUDGE FULD: Professor Miller.

15 MR. MILLER: I take it you would subscribe
16 to Mr. Lieb's position that you will extract transfer
17 of the reprint rights upon accepting an article for
18 publication in your journal?

19 MR. KOCH: Yes, with the additional stipula-
20 tion, you see, that the authors in controlling our
21 operation can decide that they want to reserve for
22 themselves and for the author community certain rights --
23 for example, the professional rights, the questions
24 of intellectual rights in connection with a particular
25 service.

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2 MR. MILLER: So that, for example, if
3 you extracted an automatic reprint power as the
4 publisher of this journal, you could envision that
5 that would be subject to an author's veto at some
6 point down the pike when he became disenchanted with
7 the scientific views expressed in the piece and he
8 could then withdraw that reprint right from you as
9 a matter of scientific integrity?

10 MR. KOCH:

11 In the present system once the article
12 is published you cannot withdraw it. It is there
13 but he can issue addenda, errata.

14 MR. MILLER: He doesn't want it reprinted
15 any more. He recognizes that it is in the libraries
16 and he has to live with that, but he does not want
17 anybody coming along and reprinting that article
18 because he does not believe what he said was right.

19 MR. SARBIN: May I say it is like the
20 difference between your draft and your final.

21 MR. KOCH: It may be.

22 MR. SARBIN: I wrote a paper a year ago
23 and I have now modified some parts of that. I do
24 not want anybody to reprint what I first wrote.

25 MR. KOCH: I don't know how to answer that
now. I would say that if the governing board were

1
2 to determine that that is what the physicists wanted,
3 they would have those rights, yes.

4 MR. MILLER: That actually wasn't my
5 question, but it was just picked up.

6 In the passage you quoted to us from page
7 9 of your final statement, you say in talking about
8 protecting the tapes and abstracts of the journal,
9 "Presumably such protection is to be provided at the
10 input of a computer system and will result in licens-
11 ing arrangements."

12 What do you mean by that?

13 MR. KOCH: The question of what do you
14 mean by the copyright of the computer tape. We would
15 propose to have our computer tape with a copyright
16 sticker on that computer tape protected by copy-
17 rights and we would then license the use of that
18 computer tape to networks and so on.

19 MR. MILLER: Do you have any notion as to
20 how you would deduct for fair uses of that computer
21 tape comparable, say, to the case of a bound volume
22 in a library that sits on a shelf where only one
23 royalty is paid for the one book but the fair uses
24 of that book can go on indefinitely?

25 MR. KOCH: That is one of the types of

1
2 questions we have not faced.

3 I don't know how to answer that. I don't
4 know whether indeed it would be possible to have a
5 fair use of that sort. Perhaps one could, but I
6 don't know.

7 For example, there are some questions involv-
8 ing systematic reproduction that point out difficulties
9 in accommodating to the fair use concept.

10 Fair use to me is an individual producing
11 something for his personal use, almost either doing
12 it himself or having an institution representing him
13 in producing that individual copy, one copy.

14 MR. MILLER: But if you license that tape
15 to a university and that university loaded it into
16 a system, there would be a mixed picture of fair
17 uses and compensable uses.

18 I was just wondering whether your organiza-
19 tion had thought through how it would so structure
20 its licensing arrangements to take account of both
21 types of uses.

22 MR. KOCH: Yes. We would attempt to take
23 account of those types of situations by the institu-
24 tion itself.

25 For example, we have an associate program

1
2 where some ninety industries contribute annually to
3 us and they are part of our membership. We in 1977
4 have given them a gratis license to photocopy from
5 any of our journals.

6 Now, we also provide presently computer
7 tapes of abstracts at cost to university physics
8 departments. We charge for the cost of tape reels
9 and mailing.

10 These are the kinds of procedures that
11 we also envision in the future in order to provide
12 the widest possible dissemination, but necessarily we are
13 always ⁱⁿ control in order to make sure that we don't
14 go financially broke.

15 JUDGE FULD: Mr. Wedgeworth.

16 MR. WEDGEWORTH: Just two questions.

17 First, I would like to be sure that I
18 understand the implications of your statement on
19 page 9. Are you implying that you can foresee the
20 possibility that an institution, for example, may
21 subscribe to the mother lode of physical review
22 and perhaps rely on other disciplinary services to
23 supply it with copies of related journals? Is that
24 what your control of the abstract really means in
25 a practical sense?

1
2 MR. KOCH: Yes. You see, there are two
3 ways of getting the material in this journal. One
4 is the cover to cover printed journal. That is one
5 way. That is the traditional way. Another way is
6 to have an umbrella computer tape of abstracts plus
7 the services to sell any article that you wanted that
8 is covered by that computer tape of abstracts. That
9 is the alerting service.

10 You don't need the table of contents service
11 to tell you what articles are in there. You can do
12 that by the tape, and we see that kind of service
13 developing substantially for a very simple reason
14 in our case.

15 I held the journal up before and I emphasized
16 the increasing size of it. There is another character-
17 istic of the journal. They were established in many
18 cases years ago. Their subject matter coverage is
19 defined by old definitions, and therefore newer
20 subjects are frequently spread throughout many
21 different journals.

22 You find in our case that nuclear physics
23 can be found in one or two journals, whereas, the
24 subject of super conductivity will occur in eight
25 or ten journals.

1
2 We want to help in the application of physics.
3 We want to therefore make it possible for the individual
4 that is covering the subject of super conductivity to
5 get just the articles he wants from the journals. That
6 is what the future knowledge is going to make possible
7 and we want to encourage that.

8 MR. WEDGEWORTH: One other quick question.
9 How do you presently handle a request from, say,
10 a group of physicists who want to hold a conference
11 and they would like to use a number of articles from
12 one or more of your journals which may have been
13 published recently?

14 MR. KOCH: And they want to make copies
15 of that?

16 MR. WEDGEWORTH: Yes, for a program book
17 at this conference.

18 MR. KOCH: I would say that in an ad hoc
19 situation like that we would probably give free
20 permission.

21 MR. WEDGEWORTH: Do you contemplate being
22 able to retain the right to do so in licensing other
23 organizations to provide those reprints?

24 MR. KOCH: Yes, we do.

25 JUDGE FULD: Professor Nimmer.

1
2 VICE CHAIRMAN NIMMER: My question has
3 been answered.

4 JUDGE FULD: Mr. Dix.

5 MR. DIX: This may be answered by some
6 members of the Commission, but on page 9 you say
7 in No. 1: "Secondary information services wanted
8 to copy AIP abstracts or to write abstracts of AIP
9 articles, or, in general, wanting to create a data
10 base of items," and so forth, "will have to negotiate
11 a licensing agreement."

12 Are you maintaining or is the present
13 state of the law that you can control the writing
14 of any abstract by another party of something you
15 publish?

16 I can see why the copying of an abstract
17 which you have published can be protected under your
18 copyright, but in here you are claiming that
19 I may not write a summary of an article that you
20 have been given.

21 MR. KOCH: Well, let me say to you that for
22 one I am not a lawyer. Second, the question of
23 abstracts is very tricky indeed, partly because the
24 abstracts may contain a listing of the scientific
25 principles that are covered in that article. Those

1
2 scientific principles, if you call that an abstract,
3 are not copyrightable.

4 On the other hand, it is the copyright
5 owner's right to control the derivatives that are
6 made of his copyrighted article. If you make a true
7 derivative original abstract, I think the copyright
8 owner can influence and have a say in that.

9 Now, let me say to you that never are we
10 worried really by an individual abstract being re-
11 produced or copied or what have you. What we are
12 concerned about is the situation where every abstract
13 from every one of our journals is being systematically
14 copied, and indeed I emphasize the computer tapes
15 because those are the author controlled abstracts.

16 We want to stimulate the use of author
17 controlled abstracts. We now have the situation
18 where some abstract and index services are deliberately
19 rewriting abstracts to avoid copyrighting.

20 We then have a computer system where you
21 consult the computer system and it will have eight or
22 ten different data bases, say, in them, that are
23 contained in our abstract and every one of those
24 abstracts in principal can be different. That to me
25 is nonsense. That inhibits the question of low cost.

1
2 It is preventative from having low cost services,
3 speedy services and quality services.

4 We want to have the author continually
5 involved and have his version of the article be the
6 one that gets disseminated.

7 JUDGE FULD: M s. Wilcox.

8 M S. WILCOX: I wonder if you might comment
9 on one thing.

10 You suggested, I believe, that the individual
11 members' subscription has been reduced by a factor
12 of two. I don't know during what period and I think
13 you suggested that this might have resulted from a
14 change in the format, the patterns of using the
15 journal.

16 This is a two part question. Has there
17 been any change in the non-member subscriptions, and
18 do you anticipate any change as a result of some of
19 the user studies that are suggesting that there is
20 hardly any use in some of your member subscriptions
21 of some of the journals?

22 MR. KOCH: Well, there are several questions
23 that you have asked.

24 M S. WILCOX: I know.

25 MR. KOCH: Let's take the last part first

1
2 dealing with the members. We feel that the cover to
3 cover journal, for the purpose of browsing, for
4 example, is for many of the publishers going to
5 continue to serve its role and all we envision as to
6 the technology we are going to do is to supplement
7 this existing service, but there are different kinds
8 of users, as I said before, so we do not see the
9 cover to cover journal stopping, the printed journal
10 stopping. It will just be supplemented.

11 As for non-members, the non-members are
12 going to be more and more served by the computer
13 tape and the provision of individual copies of
14 articles.

15 With respect to our forty journals, the
16 number varies depending upon how you define what
17 we publish, but we treat them now as one large
18 journal. It has some boundaries on it particularly
19 as far as the non-members go, and we in fact sell
20 packages of microfilm that way in monthly editions
21 and annual editions, but we do treat them almost
22 as one large journal, and more and more the members
23 who will have access to the techniques that allow
24 them to keep that as one large quality content journal
25 will use them in preference to the cover to cover

1
2 journals, but the cover to cover journals for some
3 individuals and for some purposes will continue to
4 be needed.

5 I don't know if that covers that multiple
6 type question.

7 MS. WILCOX: Well, partly, but has the
8 same thing happened with your non-member subscriptions?
9 They were reduced by a factor of two?

10 MR. KOCH: Yes.

11 MS. WILCOX: What effect would that have
12 on your publishing viability of the journal?

T-6 13 MR. KOCH: Well, it would change the
14 income that we need to produce the total number of
15 pages.

16 You see, the number of pages during this
17 period has not gone down by a factor of two. They
18 continue to go up, or in some cases, they stay level,
19 but what we have had to do during this period is
20 to increase the subscription prices.

21 VICE CHAIRMAN NIMMER: All right. Do the
22 members of the Commission have any further questions?

23 (There was no response)

24 (The resolutions passed by the AIP Governing Board
25 are attached herein as part of the record.)



AMERICAN INSTITUTE OF PHYSICS

335 EAST 45 STREET, NEW YORK, NEW YORK 10017 • (212) 685-1940

H. WILLIAM KOCH
Director
SIDNEY MILLMAN
Secretary
GERALD F. GILBERT
Treasurer

28 April 1977

Mr. Robert W. Frase
Assistant Executive Director
National Commission on New
Technological Uses of Copy-
righted Works
Washington, D. C. 20558

Dear Bob:

In response to your request, the resolutions that were passed by the AIP Governing Board on 1 April 1977 are as follows:

- "1. MOVED that the Governing Board approve for AIP-owned copyrighted publications published after January 1, 1978, subject to adoption of policies by the Governing Board for authors' use of their published materials, the general requirement of a written transfer of rights under copyright to the extent transferable from writer and/or his institution to the publisher at time of submission of manuscript."
- "2. MOVED that the Governing Board approve the adoption of codes and standards for the first page of each article that are consistent with those being developed cooperatively with other publishers, subject to approval by the Publishing Policy Committee and consultation with the Publication Board."

Mr. Robert W. Frase
28 April 1977
Page Two

"3. MOVED that the Governing Board approve the adoption of standardized wording of copyright notice for the inside publication cover, and wording for transfer to the publisher of copyright with explanatory material explaining the need for transfer. The statements to be used will be developed by a committee appointed by the Board Chairman."

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely yours,

Bill

H. William Koch

HWK/dd

MR. KARP: Thank you, Professor Nimmer.

I am moved to make a very brief comment for this reason: The Authors' League has been identified quite closely with the Association of American Publishers in the copyright revision bill, and particularly in the debate over Sections 100 and 107. We sat on the same side of the table and we had spoken jointly and I fear that silence at this point on the part of the League might somehow be mistaken for complicity, acquiescence or approval of the plan submitted by AAP, and this is simply not the case.

We have played no part in drawing this plan. We were not consulted. The first time I saw this plan was this morning, and leaving aside the details of the plan, which are pretty much old stuff, the ideas were developed throughout the long previous discussions.

In fact, I am flattered to see that even a much derided stamp plan and payment system, which was mine, was incorporated in the plan.

JUDGE FULD: It is not final yet.

MR. KARP: I haven't given my permission for it.

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1
2 The basic problem is one that has been
3 touched on by questions by several members of the
4 Commission, and that is the concept and the structure
5 itself.

6 The rights that this plan deals with are
7 rights that are secured by Section 201 of the
8 revision bill, and indeed, by the present law,
9 because the committee report on 201(c) says it
10 reflects the present law.

11 This is a conscious effort by a lot of
12 trade journal publishers and scientific publishers
13 to demand and seize control of this right. It is
14 not compliant with the present law, the copyright
15 act, the new copyright, or indeed with other statutes
16 within the structure which would freeze, implement
17 and, in effect, try to coerce that practice into a
18 universality even in the field of scientific, technical
19 and medical publishing and writing, and I think could
20 not be acceptable to American authors and any attempt
21 to distinguish in this area of basic rights between
22 the rights of scientific, technical and academic
23 or other authors and people who write for Harpers
24 and the New Yorker is nonsense.

25 There are rights, as some people have pointed

1
2 out, Professor Miller and others, which are not even
3 economic, such as rights involving the protection of
4 the integrity of the work, of deciding that it should
5 be withdrawn or deciding that it should be used without
6 charge, in addition to the fact that the ass — on
7 is made that all economic benefits should rightfully
8 belong to the publishers of the journal when indeed
9 there may be reason why less than fifty percent
10 should belong to them.

11 This nonsense about peer review would cause
12 laughter at the New Yorker, where the peer review
13 by New Yorker editors is much more rigorous than
14 any scientific journal has ever given to any article
15 of any author.

16 If you get into the question of editorial
17 contributions, a peer review is nothing more than
18 the same. You can't make changes that way.

19 I think it is important to put on the
20 record at least from one organization of American
21 authors the very strong statement that they do not
22 for a moment accept any attempt to set up an organiza-
23 tion, even allegedly in a narrow area, which is to
24 be managed by publishers or based on the concept
25 that publishers should control the rights or use

1
2 the organization as part of an effort to seize them
3 or to retain all the economic benefits such as they
4 may be from the photocopying for themselves, and
5 I dare say that other organizations representing
6 authors, particularly in this field, including --
7 possibly the American Association of University
8 Professors and other groups, will have something
9 to say about it too.

10 We do request permission, and I know you
11 will grant it, to put a more detailed statement
12 into the record, but I felt it was important at
13 this time to state the views in view of our past
14 association.

15 VICE CHAIRMAN NIMMER: May I just by way
16 of clarification of your statement, Mr. Karp, ask,
17 would it be correct to understand your position as
18 not opposing a mechanism of this sort without neces-
19 sarily endorsing it in all its details, but rather
20 your point is that it should not be administered
21 solely or in whatever degree by the publishers?
22 Is that it?

23 MR. KARP: That is exactly my point,
24 Professor Nimmer, because the Authors' League
25 did participate in the earlier negotiations and

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1
2 I think we made some contributions, and you will hear
3 this afternoon from ASCAP.

4 There is nothing inherently necessary in
5 a licensing organization which requires that publishers
6 control it. In fact, in my experience in ~~the~~ field,
7 I would say you might start with a better prospect
8 of success if publishers did not control, but in any
9 event at least there should be an equal voice by
10 authors and representation by user interests if they
11 are interested in participating.

12 JUDGE FULD: We will look for a memorandum
13 from you then.

14 MR. KARP: Thank you.

15 JUDGE FULD: We will recess, unless there
16 be any questions or comments, for lunch and come back
17 at 2:00 o'clock.

18 (Whereupon, a luncheon recess
19 was taken.)
20

21
22
23 * * *

24 118<
25



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Final

H. WILLIAM KOCH
Director
SIDNEY MILLMAN
Secretary
GERALD F. GILBERT
Treasurer

Testimony Before the Commission on New Technological Uses of Copyrighted Works

31 March 1977
New York, NY

H. William Koch, Director
American Institute of Physics

Abstract

The Commission has requested a statement of the view of the new Copyright Law from a not-for-profit publisher. The statement prepared in response expresses the views of the American Institute of Physics as a scientific society publisher. It refers to, but cannot detail, the evolving policies of the AIP that will be more firmly developed at the meeting of the AIP Governing Board on 2 April 1977. Those policies will presumably be based on the continuing need to claim exclusive rights for this publisher to authorize original publication as well as further reproduction or other uses of articles published in its journals. The statement also describes an important remaining dilemma for primary publishers that involves rights under copyright for abstracts and other items derived from journal articles.

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Introduction

How do publishers view the new copyright law? While I cannot speak for the publishing community as a whole, nor even for other large non-profit journal publishers, I am confident that the American Institute of Physics is not alone in looking forward positively to the implementation of the new copyright law in 1978. In our view, the new law not only provides reasonable protection for the professional rights of authors and the financial obligations of publishers, but will encourage the application of new technology to a range of new uses of copyright material. I certainly expect the new law to strengthen our ability to promote the chartered purpose of the American Institute of Physics, which is the advancement and diffusion of the knowledge of physics and astronomy and its application to human welfare.

Let me begin by giving you a brief sketch of how AIP presently accomplishes its purpose. I shall then discuss how the new copyright law applies to scientific society publishers in general and to AIP in particular.. Following this, I shall refer to the specific procedures that will be developed by the Governing Board of the American Institute of Physics at its meeting on 2 April 1977. Next I shall make a few remarks about how we are cooperating with other publishers to establish the new copyright regime intended by Congress. I shall conclude with the vexing question of abstracts: How does the new law apply to abstracts, excerpts, or summaries of articles?

AIP as a Journal Publisher

The American Institute of Physics and its nine member societies publish over 100,000 pages per year in original and translated journals devoted to research and education in physics and astronomy. These pages represent a financial investment

to physics and astronomy societies of about \$10 million per year. They also constitute a comprehensive archive of the scientific and professional output of the U.S. physics and astronomy community. Included in these pages is almost 90% of what is published in the U.S.A. in physics and astronomy research and education, as well as translations of the most important 50% of the physics and astronomy research published in Russian in the USSR.

This publishing program has a long and successful history because it has maintained high scientific standards while keeping subscription rates low. The prices paid by libraries for AIP journals are two to five times lower than those paid for other privately published physics and astronomy journals, when measured in dollars per word or per standard page, and consequently the circulation figures for AIP journals are several times larger. Furthermore, the permissions policies of AIP and its member societies are liberal, in order to encourage fair-use photocopying and other forms of republishing. It is our intent to continue these policies and to encourage wide dissemination of the physics and astronomy literature under the new law.

Journals of Scientific Societies under the New Copyright Law

The new copyright law has been called an "author's law." Obviously, one of its principal purposes is to encourage the creativity of authors by strengthening the protection of their intellectual and property rights. But to me a remarkable aspect of the new law is that it apparently also will be successful in protecting the interests of scientific societies as publishers of collections of individually-authored research articles in the form of journals. To see how this may be accomplished, let us consider first how such journals are actually produced and disseminated.

Historically, the process begins when a group of scientists defines and identifies itself by forming a scientific society devoted, typically, to a narrow subdiscipline of a scientific field. The creation of a new journal is often the main motivation. As potential authors, these scientists have thereby collectively undertaken to develop and improve scientific standards within their subdiscipline. Following well-established models, they agree voluntarily to submit future articles to review by their peers and to participate in the operation of this peer review process. They do not expect to be paid for writing articles by the journal publisher, which is, after all, their own society. Indeed, under the page charge system, the authors arrange to contribute funds to the publisher rather than the reverse, as in the case of authors of commercial books. Page charges help to keep down subscription prices and therefore increase circulation, which, in turn, promotes the interests of the authors as scientists and the scientific standing of their subdiscipline. In return for their professional services in this collective endeavor, the members of a scientific society can usually get a subscription to their journal at a low incremental run-off cost, often as part of their society dues.

In this relatively simple non-commercial environment, scientific societies as publishers have traditionally not been much concerned with copyright. Usually it is assumed, with varying degrees of formality, that the process of peer review and eventual acceptance for publication, which every article in a journal issue must undergo, is sufficient to give the society the right to the copyright of the issue and each of its articles. In a very real sense the authors collectively are the society, so it is perfectly natural for the society to represent the authors' interests in marketing, sales, permissions, and other aspects of the journal dissemination process.

In the future, and the future is already upon us, the journal publishing process will be more complex because of an enormous expansion in the range of technological options available for information dissemination. The future looks bright for society publishers, if they can take full advantage of this technology. Here is the great merit of the new copyright law: It will permit a scientific society to continue to represent and serve its members, benefit society at large, provided only that the individual author formally transfers his or her copyright to the society. The new law is indeed an "author's law," but a scientific society will be both author and publisher.

Let us look at some of the new dissemination options. Not only will journal issues continue to be handled as collections of articles, but single articles will be available from the original publisher as well as from republishers. Formats will expand to include microform editions of articles and journals and computerized editions of journals. Within the next two years the American Institute of Physics will, for example, have the full text of all its journal articles available in computer-readable form, for the production of assorted collections of articles and derivatives, such as computer tapes of author-prepared abstracts and journal indexes.

One significant aspect of these developments is that the various formats will also be available simultaneously, relatively promptly, and economically. Most existing computer tapes of abstracts are useless for purposes of current awareness, since the abstracts on them typically refer to articles published four to six months previously. In contrast, some of AIP's tapes are already today available even before the journals themselves are printed. Another significant point is that computerized typesetting is now becoming more economical than even the low cost typewriter composition methods pioneered by AIP and its member societies.

Scientists as authors will, of course, have the option to retain their copyrights and to disseminate their articles without benefit of independent peer review, or they can elect to transfer their rights and request the scientific society as publisher to act in their behalf in reviewing, editing, and disseminating their articles. The result for the author in using the society publisher should be an article that is more economically and speedily produced and | widely and accurately disseminated.

The new law has the following features which will be particularly important to scientific society publishers:

1. An author establishes copyright in his own name at time of creation of the manuscript of an article.
2. The copyright owner has the right to control the production and marketing of the copyrighted work and of its derivatives such as abstracts.
3. A valid transfer of copyright from the author to the society must be made formally in writing.
4. The copyright of a collection of articles in a journal issue protects not only the collection but each individual article in the collection. Nevertheless, the inclusion of a copyright notice on each article will clarify whether the publisher or the author is the copyright owner.
5. The notice of copyright must appear on each photocopy of an article made by a library, archive, or other reprint center.
6. Photocopying by a library or archive which is part of an institution operated for commercial advantage is subject to greater restrictions than photocopying by a non-profit institution.

Scientific societies will have to recognize these features and take them into account in establishing appropriate procedures for encouraging the continuation of both "fair use" photocopying without fee and "beyond fair use" photocopying for a fee by libraries as well as by authorized reprint and computer-tape service centers.

AIP Policies under the New Law

The policies of the American Institute of Physics are still under development, but will be implemented before the end of the year to accord with the new law in 1978. The approvals obtained to date from our Governing Board already provide a framework for the policies to come. The most important single element in that policy is the intent to establish a valid copyright in the name of the journal owner not only for the collective work (the journal issue) but also for each contribution to that work (the journal article).

Participation with Other Publishers

The new copyright law establishes principles that are intended to apply to all and to become the law of the land. In order to be consistent with this intent of Congress, AIP and other society publishers of technical, scientific, and medical journals are participating with other publishers and republishers in the design and development of a "Copy Payments Center" concept developed by a task group of the Association of American Publishers.

This Center will collect from the user and distribute to the publisher the fees prescribed by the individual publisher for the copying of articles appearing in the publisher's journal.

Abstracts

Scientific society publishers are accountable to their memberships for the use to which the material in their journals is put, and for the accuracy and promptness with which it is disseminated. This includes excerpts, abstracts, and derivative works of all kinds.

Primary journal publishers have always respected each other's copyrights to parts of articles by, for example, asking permission of each other to reprint a graph or a table from a previously published article. The American Institute of Physics and its member societies require anyone who wishes to reprint a figure or other excerpt from an article to obtain also the author's permission; and we will continue this policy under the new law, as a matter of intellectual courtesy to the original author.

There are many publishers of secondary information about journal articles, who are presently freely copying or deriving abstracts from the primary journals, who will now be required to obtain permission to do this from the copyright holder, i.e., the primary journal publisher. But the primary journal publisher will not necessarily grant a free license to reprint abstracts to a secondary service. Increasingly, abstracting and indexing services will want to offer not only printed collections of abstracts or other excerpts, but computer tapes of abstracts and on-line computer searches of such data bases. Combined with single-article reprinting such services could, in principle, have a profound effect on the economics of primary journal distribution. Aside from economics, another effect on the primary journal publisher of copying or rewriting abstracts is the introduction and propagation of errors. At the same time, primary journal publishers themselves are computerizing the journal production process and are increasingly able to provide a machine-readable version of their abstracts or even of whole articles. For these

reasons it is clear that primary journal publishers will take full advantage of all their rights under copyright to exercise control over the systematic use by others not only of whole articles but of parts of articles such as abstracts.

In the case of the American Institute of Physics our policies in this area will be guided by the following principles:

- (1) Secondary information services wanting to copy AIP articles or to write abstracts of AIP articles, or, in general, wanting to create a data base of items which can stand for AIP journal articles, will have to negotiate a licensing agreement with AIP. This must include specification of all products or services which will use these abstracts or items, so that their potential impact on AIP primary journals can be determined.
- (2) A free license will be granted if this potential impact is likely to be negligible; for instance, if the proposed services are designed for a market which does not overlap with the market for AIP's own services and journals. Otherwise an appropriate charge will be made.

Probably the more important issue with respect to abstracts is the copy-rightability of a computer tape of abstracts. Such tapes are now commonplace and are the first stage, as I have already indicated is the situation at AIP, to computer tapes of the complete journal. It is our position that both the tapes of abstracts and of journals must be protected by copyright just as are the printed abstracts and journals. Presumably such protection is to be provided at the input of a computer system and will result in licensing arrangements as there are copy-right protection and licensing arrangements for the use of the printed journals in any marketing and distribution system.

Conclusion

We are impressed by the cooperation all sectors of our publishing communities are evidencing in the desire to implement the new law, by the encouragement of prestigious bodies such as the National Commission of Libraries and Information Science, and the Commission on New Technological U Copy-
righted Works, and by the soundness of the new copyright law to which so many contributed. The future looks bright both for the implementation of new technologies to meet the complex information needs of our society, and for the preservation of what is best in traditional practices.

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AFTERNOON SESSION

2:00 P.M.

JUDGE FULD: I call the afternoon session to order, please.

Mr. Fr is an announcement to make.

MR. FRASE: There have been a number of inquiries about getting transcripts of today's meeting.

We have a regular arrangement to make transcripts available through the National Technical Information Service. It usually takes about a month before this happens, what with getting them back and editing them and getting them over there, but we will put out a press release indicating what the number is when they are available through NTIS.

JUDGE FULD: And earlier transcripts are available as well, aren't they?

MR. FRASE: Well, for witnesses who would like them, yes, but we are limited in supplying copies generally. We like to do it after the final version is available through NTIS.

JUDGE FULD: Our next witnesses are from the American Society of Composers, Authors and Publishers.

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1
2 Mr. Bernard Korman is general counsel of
3 ASCAP. He received his AB from Columbia College
4 and his LLB from Yale Law School. He is a member
5 of the State Department Advisory Committee on
6 International Intellectual Property and has served
7 three terms on the Committee on Copyright and
8 Literary Property of the Association of the Bar
9 of the City of New York. In addition he served as
10 Chairman of the Copyright Division of the American
11 Bar Association's Section on Patent, Trademark, and
12 Copyright Laws. He is a trustee and member of the
13 Executive Committee of the Copyright Society of the
14 United States.

15 With him is Dr. Paul Fagan, Chief Economist
16 and Special Projects Manager of ASCAP; he has acted
17 in those capacities since 1961. Dr. Fagan received
18 his BS and MA Degrees from the University of
19 Connecticut and his Ph.D. from Columbia University.

20 The Commission is happy to have you both
21 with us and delighted to hear your views.

22 MR. KORMAN: Thank you, Mr. Chairman.

23 There are two of us because initially we
24 thought that the Commission would be mainly interested
25 in some of the technical aspects of ASCAP's survey

1
2 and distribution system, and in those subjects
3 Dr. Fagan is the world's leading expert.

4 When we received Mr. Frase's letter of
5 March 15th, there were some eleven subjects that
6 we were asked to make a statement on and cover here
7 this afternoon, and many of those seemed to be more
8 within my province than Dr. Fagan's.

9 We have submitted a statement today, and
10 I don't know whether the members of the Commission have
11 had an opportunity to look at it. It covers each
12 of the eleven subjects that we were asked to comment
13 on.

14 It would take quite a while to run through
15 it and I'm not sure that's the way the Commission
16 would prefer to proceed. Perhaps the better way
17 would be for me to make a couple of comments on the
18 very excellent memorandum* that the staff has furnished
19 to the Commission, and then either go through
20 particular subjects which you may be interested
21 in or simply respond to questions, as you prefer.

22 If I may, let me just turn to the staff
23 memorandum first. In general, as I said, I think
24 it is an excellent job and I think the reason that
25 the Commission has invited ASCAP and BMI here this 151<

* Staff memorandum dated March 23, 1977 and revised to incorporate factual changes suggested by ASCAP & BMI is included in this transcript on page 145A

1
2 afternoon is that you are interested in how clearing
3 houses operate in the music area.

4 On page 2 of the staff memorandum the
5 subject of "Structure" is covered, and it is stated
6 that ASCAP is an incorporated association governed
7 by a twenty-four member board, half of whom are
8 writers and half, music publishers, and that they
9 are elected by their respective constituencies.
10 Then it states that some of the twenty-four members
11 hold office for significant periods of time.

12 That is not accurate. Each member holds
13 office for two years. He may, however, be re-elected,
14 and if he is re-elected long enough, then indeed, he
15 holds office for a significant period of time, but
16 only because of his re-election.

17 BMI, on the other hand, is a corporation
18 whose stock is owned by broadcasters whose board
19 is elected by broadcasters and whose board consists
20 of broadcasters or their employees.

21 The sentence I draw your attention to is
22 "The Board of Directors is elected by the share-
23 holders, but the operational decisions are said
24 to be made by the corporation management."

25 That last clause seems to me to require

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1
2 some semblance of disbelief. A Board of Directors
3 consisting of broadcasters hires management to go
4 out and run a performing rights clearing house?

5 The purpose for which BMI was established
6 was to create a independent-from-ASCAP organization
7 which the broadcasting industry would control, and
8 the ultimate purpose was to keep down the total price
9 that would be paid by the broadcasting industry for
10 performing rights in music.

11 Now, I know it is not your wish to have me
12 demonstrate the illegality of BMI this afternoon.
13 You are not interested in that, but --

14 JUDGE FULD: Which is larger, BMI or ASCAP?

15 MR. KORMAN: BMI claims in their statement
16 to be the largest, and if you measure that by
17 living bodies or corporations with affiliation agree-
18 ments and the numbers are as they give them, they
19 are larger than we in terms of number of affiliates.

20 In terms of collections of dollars, they
21 say that they collected last year fifty-five million.
22 We collected ninety-four million, so it depends on
23 which you wish to measure. If they are much larger
24 and have a much more valuable repertory, I would
25 expect them to collect a lot more money.

1
2 Now, I don't know really that you are much
3 interested in the structure of a clearing house, but
4 I suspect it is an important issue.

5 Our experience at ASCAP is that while authors
6 and publishers are naturally economic adversaries,
7 when it comes to dealing with music they do cooperate
8 and they are able to work very efficiently together.

9 You do not have that kind of operation in
10 BMI because writers and publishers have absolutely
11 nothing to say about how BMI deals with music, what
12 price they shall charge or how they shall distribute
13 that product. ASCAP's royalty is distributed fifty
14 percent to writers and fifty percent to publishers.
15 I don't think that is true for BMI, but you can put
16 the question to Mr. Cramer later.

17 Let me turn for just a moment to the report.
18 "Whereas, it took ASCAP," on page 4," seven years --"

19 JUDGE FULD: That is the staff report?

20 MR. KORMAN: This is the staff report.

21 JUDGE FULD: Yes.

22 MR. KORMAN: "...It took ASCAP seven years
23 before it was able to begin to pay royalties. BMI
24 was able to do that from the very beginning." Well,
25 of course they were. The broadcasters agreed in 1941

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1
2 to pay them forty percent, as much as they were paying
3 ASCAP, when they had no music, and the intention was
4 that they would take that money and go out and make
5 agreements with writers and publishers and acquire
6 rights in music, - sure they had money and they
7 were able to start operating because of their broad-
8 cast subsidization, and they have been very successful
9 in drawing writers and publishers into the organiza-
10 tion.

11 I merely am citing that the two organiza-
12 tions are quite different. The goals are different
13 and the methods of operating are different, although
14 perhaps not from the standpoint of the issues in which
15 you are primarily interested, how data is collected,
16 and so forth.

17 Going back to page two, the footnote states
18 that composers, authors and publishers convey manu-
19 scripts with a license for a limited term of no more
20 than five years. That may be so in the case of BMI.
21 ASCAP has ten year membership agreements and there
22 is no limitation on the length of time that our
23 membership agreements can run.

24 However, we do have a requirement that
25 any member may resign from ASCAP at the end of any

1
2 calendar year, and subject only to the requirement
3 that he may not remove his works from the scope
4 of licenses existing at the time of his resignation,
5 and ASCAP has a corresponding obligation to pay
6 him for performance under those licenses.

7 BMI can make offers to writer and publisher members
8 and get them to resign because they know that notices
9 can come in by October 1st and anyone can resign.
10 Meanwhile they have expiration dates all over the
11 lot.

12 They will have writer teams, for example,
13 whose agreements expire at different times, and they
14 can ask them to come over if they want to and join
15 ASCAP at the same time.

16 They have bonus arrangements that expire
17 earlier than affiliation agreements, so that if the
18 writer or publisher chooses to move over to ASCAP,
19 he can be prevented from doing so unless he is
20 willing to take payment at the lowest rate, because
21 his bonus payments will stop unless the writer agrees
22 to sign up for a longer period of time.

23 On page 5, the second paragraph states:
24 "Very roughly, the price of the ASCAP or BMI license
25 depends on the revenues of the licensee related to the

1
2 performance of music."

3 That is really not quite so. In most areas
4 it is related simply to the revenue, for broadcast
5 purposes and broadcast use are the principal commer-
6 cial users in this country and the fee is a percentage
7 of what the broadcaster receives from advertisers.

8 MR. PERLE: For ASCAP?

9 MR. KORMAN: For both, and it is not
10 related to the performance of music at all.

11 As a matter of fact, one of the things
12 that makes the clearing houses work so easily is
13 that you issue a broadcaster a license. He can
14 perform anything in your repertory. He doesn't have
15 to keep track of it for purposes of reporting which
16 compositions he has performed or for purposes of
17 computing his license fees.

18 There is, it is true, a program form of
19 agreement available, but we have one such agreement
20 out of seven thousand radio and seven hundred television
21 licensees, and generally it is a license that runs
22 to \$70 a year. It is a flat dollar deal and it may
23 run up to a few hundred or a thousand dollars, depend-
24 ing on various factors, but the fee is paid for the
25 right to use anything in the repertory as

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2 often as one wants and he doesn't have to keep track
3 of what he performs and his fee is not in relation
4 to what he performs.

5 The ASCAP radio rate is at the bottom
6 of page 5 and is usually very close now to the
7 BMI rate, maybe about fifteen percent higher. We
8 have 1.725 percent to 1.7 percent. We also get a
9 sustaining fee in the amount of about ten percent
10 more and they don't, but it is interesting to note
11 that any television broadcasters or radio broadcasters,
12 when they negotiate with ASCAP, try to put the price
13 down by pointing out that BMI has acquired a very
14 much larger share of the market than they had in
15 1941.

16 When they have been successful in getting
17 reductions from ASCAP, they have usually not sought
18 to get increases from BMI. As a matter of fact, in
19 the last go-around, BMI took a decrease at the same
20 time that ASCAP also took a decrease on the ground
21 that BMI's share had gone way up.

22 I have no comment on the rest of the staff
23 memorandum.

24 Now, Mr. Chairman, would you prefer that
25 we make some general observations in response to the

1
2 letter from Mr. Frase or simply respond to questions?

3 JUDGE FULD: I think it might be helpful
4 to make some observations, yes. We may interrupt
5 by questioning.

-7
6 MR. K/ All right.

7 Running through the statement, from pages
8 1 through 4 we deal with the structure of ASCAP, and,
9 as I said, it is a writer and publisher organization
10 fifty/fifty in terms of how revenues are divided
11 and in terms of how the society is managed.

12 Only the president and counsel among the
13 officers are salaried. The other directors receive
14 nothing other than modest \$25 attendance fees for
15 attending board meetings.

16 The day to day operations are under the
17 supervision of the president and the managing director
18 and Dr. Fagan.

19 We have a great many departments with
20 specialized functions as they are described at pages
21 2 and 3.

22 On page 4 we talk about the kinds of
23 licenses that we issue, which are different depend-
24 ing on the kind of user. The broadcast license is
25 described in pages 4 and 5.

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2 It is fair to take into account both the
3 value of the license to the user and special aspects
4 of the user's operation. Let me give you one example.
5 MUZAK is a well-known background music service. It
6 acquires a single license which extends to all of its
7 subscribers. The subscribers are all kinds of entities
8 from doctors' and dentists' offices, factories,
9 restaurants, night clubs, hotels, lobbies, elevators
10 of office buildings, and so forth.

11 The fee that is charged for the restaurant
12 retail store type of place that ASCAP would itself
13 license directly, because it is a public performance
14 for profit, is a flat dollar fee, which when set up
15 was intended to represent a substantial discount
16 from the rate that would be paid if we licensed the
17 restaurant or store directly. It was \$27 per year
18 for each such place at a time when our minimum fee
19 for others was \$60 per year.

20 When you get to factories and doctors'
21 offices, these are places that ASCAP might be unable
22 to license because we are unable to gain admittance
23 to them, or because under the copyright law they
24 might not be performing publicly for profit, and
25 there the rate is a different rate and a lower one on

1
2 balance of three and a half percent of what the sub-
3 scriber paid to MUZAK.

4 That, as I say, worked out to be fewer
5 dollars in most instances, and reflected the fact
6 that MUZAK was r performing a function for us.
7 They were selling music and they were paying fees
8 that non-members would not otherwise be able to
9 collect.

10 On page 7 we talk about the entry of
11 copyrighted works into the index. How do we find
12 out and get into our index information about
13 compositions?

14 Essentially we have records which duplicate
15 the information that the copyright office has on
16 musical works, and we have a lot more information
17 besides because members tell us about compositions
18 which they have not registered with the copyright
19 office, and they also tell us often about transfers
20 and sales of works which they don't bother to tell
21 the copyright office about so that we know who is
22 to pay.

23 We now go into Doctor Fagan's area.

24 Do you want to talk about the logging,
25 sampling and monitoring system, which begins at page

eleven of our statement?

DR. FAGAN: Yes.

The money that comes in in bulk, of course, needs to be distributed to individual members of ASCAP, and we have a mechanism to do that, with a share apportioned to each member.

The mechanism is a survey of performances. The survey of performances is a mixture of a complete count of performances in some areas, network television, for example, a sample of performances in other areas, radio and television, background music, and in some areas we find it impractical to survey at all, performances in night clubs, bars, restaurants and so on.

There we use an approximation as to performances, the approximation being the feature performances we find in the radio and television areas.

The design of the sample was initially by Golding Associates back in the late 1950's, but is currently being monitored and revised by a firm of outside survey experts, Robert Nathan Associates.

One of the prime features of the sampling system where we have a sample -- that is, in radio and television on the local side -- is that it is

1
2 a random sample. It is a sample which gives weight
3 to the dollar importance of the individual stations.
4 It is so designed so that stations from all areas
5 of the country or types of areas in each area of
6 the country are represented.

7 As to the size of the sample in local
8 radio, it consists of sixty thousand hours of local
9 programming, and local television is thirty-five
10 thousand hours of local programming.

11 MR. CARY: Excuse me, Dr. Fagan; would
12 you accept a question at this point?

13 DR. FAGAN: Certainly.

14 MR. CARY: Going back to your statement
15 about how you take care of night clubs and local
16 bars and that sort of thing, could you elaborate
17 on that a little bit?

18 I am interested from the point of view that
19 here is a vast number of small type organizations
20 which do perform, and yet it is kind of hard to get
21 the fact as to how much they perform, so you obviously
22 do not use the other sample that you use on radio and
23 TV. Could you elaborate on that a little bit?

24 DR. FAGAN: Yes. We have, I think in the
25 order of thirty-five thousand licensees, and they

1
2 range in fees to us where it could be a seasonal
3 operation and I guess they could be as low as
4 \$45 a year, and they may go up to several thousand
5 dollars a year, but in making a survey large enough
6 for it to be possible to sample them directly -- as
7 a matter of fact, back in, I believe it was, the
8 early 1960's and it may have been in the late 1950's
9 there was an experimental survey made of uses with
10 these kinds of licensees. An outside organization
11 was given a budget which, as I recall, was \$25,000
12 to test the feasibility of directly sampling these
13 performances, and they came back and said no, there
14 was no way of doing it.

15 Now, given the fact that there are performances
16 in these areas, and there are, no doubt, hundreds of
17 thousands, if not millions, probably several million
18 performances here, the question comes up as to how
19 to distribute the money on a fair basis.

20 MR. CARY: Before you get to the distribution,
21 how do you arrive at the \$45 for this place and
22 \$75 or \$100 for this place, or whatever it is?

23 DR. FAGAN: The fees charged are based
24 on objective factors, but they are geared to two
25 basic measures. The first is how extensively is

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2 the music used, and the second is, what the economic
3 aspects with respect to the operation and performance
4 of the work are.

5 MR. CARY: When you say it is based on the
6 extent to the music is used, what do you mean?

7 DR. FAGAN: Well, with respect to the
8 individual itself. Let me give you an example.

9 In a restaurant you may have a performance
10 by a single instrumentalist on Saturday night only
11 or it may be an orchestra seven nights a week. That's
12 what I meant. It may be in connection with various
13 individual acts or shows, and so on.

14 MR. CARY: Then you base it on some known
15 factors that you have already ascertained?

16 MR. FAGAN: Yes.

17 MR. KORMAN: Let me say something else for
18 the moment.

19 This is a very troublesome area, and years
20 ago we had two rate schedules, one for what we
21 called bars, grills and taverns, and one for what
22 we called lounges, meaning cocktail lounges, and
23 the cocktail lounge rate was higher. That was
24 supposed to be a plush kind of place where the
25 use of music was more valuable.

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2 We had trouble in Oshkosh because the
3 local representative went in there and testified
4 that the gin mill was a lemon, and it was. You
5 don't get trades scholars licensing gin mills. He
6 went into that place and he sought to license it
7 as a lounge. The fellow down the street was
8 licensed as a bar, grill and tavern at a lower rate.
9 The fellow sought to be licensed as a lounge objected
10 and complained to the Department of Justice and the
11 department had to report.

12 Obviously it is purely a subjective matter
13 as to what it is. Where do you draw the line between
14 a posh and a non-posh place?

15 We changed our approach completely, and
16 we now have an agreement where the fact is that
17 we still have two rates for the poorer type of
18 place and the better type of place, but now the
19 rate and the factors are printed right in the
20 agreement so that the user can tell whether he
21 is being charged the right rate.

22 The rate is based on what is the highest
23 price per drink that he charges, the number of
24 nights a week he uses music, whether he has a
25 relief band, whether he charges a cover, minimum

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2 or what. A number of things and the table
3 of rates is right there for him to look at and
4 it is checked both by the licensee and by our local
5 representative

6 we people go around checking to be sure
7 that the proper factors were applied, because it is
8 very easy to see a gin mill operating. A more favor-
9 able representative could say there are 175 seats,
10 and you say, "I only have 100," that makes a difference
11 of eleven bucks a year. You have that sort of
12 probability into the thing, so we have to be very
13 careful because we may not discriminate among
14 similarly situated licensees.

15 Now, we hear stories, and I have no idea
16 whether they are true or not, and BMI takes a different
17 approach.

18 BMI bases it on what the user says his
19 entertainment expense was, and the user might say
20 that he spent in a certain bracket. If you spend
21 under 5,000 or whatever per year, your fee is so
22 much, between 5 and 10,000 your fee is so much and
23 so much and so on, and we have been told by our
24 people that there are cases where BMI representatives
25 have taken places with large orchestras seven nights

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2 a week, and the license was under \$5,000. There is
3 no way that BMI can know whether that man is ripping
4 them off or not, but they have a problem there and
5 how do they know when the representative tells them
6 what he 'bout the accurate amount, because
7 one of the significant differences between ASCAP
8 and BMI is that they say that they cannot afford
9 to audit. We say that we cannot afford not to audit,
10 and we audit our broadcast licensee and it creates
11 a certain amount of ill will because people don't
12 like to be audited.

the members of

13 It certainly involves quite a bit of money.
14 When you go into the television network it is about
15 \$50,000,000, and it is an indication that we want
16 to collect all that the agreement calls for.

17 MR. FRASE: I want to finish with Mr. Cary's
18 question. You do not sample by individual tavern,
19 et cetera, but I take it what you do is to apply
20 the information you get about what music is played
21 in broadcasting and get a picture of revenues
22 from bars and grills and distribute it on the
23 same basis?

24 DR. FAGAN: Mr. Frase, let me express
25 it my way, if you don't mind.

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2 MR. FRASE: Yes.

3 DR. FAGAN: I think I mentioned that we
4 use feature performances that occur on radio and
5 television as an approximation for performances in these
6 general licensees. What I mean by that is the
7 credits which are earned by the compositions per-
8 formed on radio and television are increased
9 by virtue of the fact that we have money from these
10 general licensees.

11 To put that a little more specifically,
12 the feature performances on radio and television
13 are paid approximately fifteen or sixteen percent
14 more than would otherwise be paid by virtue of their
15 being a proxy for the performances on these general
16 licensing agreements. 6

17 May I turn now to the subject of the
18 formulas for payment to composers, authors and
19 publishers?

20 MR. KORMAN: Let me make this note that
21 page 17 deals with and covers the matching of
22 performance of all musical works with the index
23 of ASCAP works.

24 DR. FAGAN: Turning now to the formulas
25 for payments to composers, authors and publishers,

1
2 at ASCAP the distributable revenue, which is the
3 total revenue after expenses, is first divided in
4 half, one-half to publishers and one-half for
5 writers.

6 The formula for publishers and writers
7 differs somewhat. On the publishers' side, the
8 amount paid to each publisher is that publisher's
9 proportion of the performance credits to be paid
10 on in that particular quarter. During the year
11 a publisher with two percent of the performance
12 credits receives two percent of his publisher money,
13 and so on.

14 With respect to writers, they have an
15 option. They can select either a current performance
16 option or what we call a "four fund option."

17 The distribution of the money between the
18 current performance option and the four fund option
19 members is based on the relative current performances
20 of the two groups, so in the aggregate the two groups
21 are paid based on current performances.

22 Within the group of writers who have
23 selected to be paid under the four fund basis,
24 first of all, twenty percent
25 of the total money is paid out on the basis of

1
2 current performances, forty percent of the money
3 is paid out on the basis of average performances
4 over a five year period, twenty percent is paid
5 on a five year record of performances, recognized
6 works, works that have been performed at least one
7 year prior in the survey, and twenty percent is on
8 the basis of continuity. Continuity in this game
9 is performance over a ten year period and weighted
10 by quarters of membership with a limit of 168
11 quarters.

12 MR. CARY: That would apply to someone
13 like Irvin Berlin, I take it?

14 DR. FAGAN: Yes, it would.

15 MR. KORMAN: He was a charter member in
16 1914.

17 MR. CARY: Yes.

18 MR. KORMAN: On reciprocal arrangements
19 with foreign performing societies, that is covered
20 on page 24.

21 The interesting thing there I think is
22 essentially that -- well, the United States is a
23 rare case in having more than one performing rate
24 licensing organization. Most countries in the world
25 have only one, and every writer and publisher normally

1
2 belongs to that society.

3
4 But, Brazil has a half dozen or
5 so, with societies licensing work depending on the
6 character of the work.

7 At the present time we have agreements
8 with some thirty-five foreign societies where ASCAP
9 grants each foreign society the right to license its
10 entire repertory and the foreign societies do the same
11 except that they may exclude separate works which
12 are to be licensed in the United States through
13 another licensing organization, such as BMI or
14 SESAC.

15 Now, for example, France will license the
16 British repertory in France and Britain will license
17 the French repertory and deal with the foreign com-
18 poser in the same fashion as they deal with their
19 own members.

20 ASCAP conveys the right to license its
21 repertory to all the foreign societies and they
22 in turn grant us the right to license their entire
23 repertory subject to their right to notify us of
24 works that are not to be licensed by us here because
25 they are going to be licensed by somebody else, either

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2 BMI or SESAC for the United States, so that the
3 distribution of their representation in the United
4 States is among the three performing right licensing
5 organizations here and each of the United States'
6 three organizations grants the right to license its
7 respective repertory to the various foreign societies
8 for their services and here you deal essentially with
9 the foreign composers and publishers in the same
10 fashion as you deal with your own people.

11 Now, that is easy when you deal with
12 people as formally as ASCAP does. I don't know
13 how it works when you don't.

14 In other words, BMI has been permitted to
15 have special deals with certain societies which give
16 them the right to deal in New York State, and it
17 makes it a more attractive deal to get somebody
18 to license through the various organizations.

19 With respect to enforcement procedures
20 ASCAP seeks to license, and I am sure BMI seeks
21 that too, all music users.

22 The broadcasters are easy to find. When-
23 ever a new FCC license is issued, we start writing
24 the fellow before he begins broadcasting and we
25 tell him that he needs a license and his lawyer

1
2 says that is right, but you do get into very serious
3 problems where you deal with the small rural user
4 who would prefer not to pay, and we have fifty state
5 legislative problems where someone will complain to
6 a local legislator that some New York outfit is
7 compelling him to pay fees, and the state senate
8 says, "Don't worry about them. We will take care
9 of them," and that causes very serious difficulties.

10 So you are aware of the problem because
11 it costs a lot of money in terms of not licensing,
12 and now we are for the first time beginning to
13 license in Alaska where they adopted most of the
14 statutory law in Washington dealing with licenses
15 and that law has been complied with, and now we
16 have to get up a lot of documents to file in Alaska
17 which no one will ever look at, but we have filed
18 them and we are now about to license there.

19 You are aware of these problems when
20 you go after unlicensed users, because we are big
21 compared to the local gin mill and the \$250 minimum
22 damage provision is a very important provision
23 for ASCAP and BMI. Without it, it would be very
24 difficult to license. You have to prove what the
25 value of the performance was if you have to establish

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2 damages, so we are careful when we sue to sue only
3 for an amount which relates closely to what the
4 licensee or the user would have been paying.

5 We make it a little bit more expensive
6 the first time around. The second time we may
7 sue them for a little more money, and there of
8 course we have to report to any legislative
9 committee to determine that that was not an
10 unreasonable thing to do, but you could do it
11 with the restaurant and the one night performances.
12 \$250 is a lot of money for a fellow who might have
13 to pay \$150 a year in dues. We are careful not
14 to do that kind of thing.

15 JUDGE FULD: Has your method of collecting
16 and of enforcement changed over the years, been
17 modified or what?

18 MR. KORMAN: We changed the kind of
19 literature that we used, but essentially it has
20 remained the same, and I suspect we could do it
21 much better and we have spent a lot of time figuring
22 out how to do it better. It is a very expensive
23 proposition.

24 Whereas, overall ASCAP operates at just
25 slightly under twenty percent, we are returning

1
2 four dollars every five we collect. We probably talk
3 about thirty-five cents out of every dollar collected
4 in the general license area.

5 Licensing a television network, when you
6 make a deal with them, brings in a lot of money at
7 relatively little cost, aside from being involved
8 with ABC in an anti-trust suit. Other than that
9 we have adopted a procedure and followed a procedure
10 that Herman Finkelstein developed over the years.

11 When I came with ASCAP in 1951, it was
12 shortly after every aspect of ASCAP's business was
13 held to be illegal. In 1950 the court was given the
14 ultimate power to fix a reasonable fee, but from
15 1948 until about 1952 or 1953 we didn't do anything.
16 We were really caught shy, and when we went in we
17 started in ten or twelve places a year and it got
18 up to a few hundred by the end of the 50's a year.

19 In those days I didn't do much in the
20 field. We were concerned possibly about an anti-
21 trust action where if they had two separate users,
22 one on the air by broadcasters, other users might
23 object to having it picked up.

1
2 We also have some contract options. We
3 really go quite far to avoid having a suit. We
4 make visits before we begin a lawsuit, and the
5 files are all kept in New York and all the papers
6 for these actions are prepared in the union.

7 With respect to the revenues discussed
8 at page 29, we don't give the costs of operation
9 because we don't make them public generally. If
10 it is important to the Commission, as we say, for
11 your information on a confidential basis, we will
12 be happy to furnish them.

13 With respect to the guidelines for ASCAP
14 operations in the consent decree, as I have indicated
15 earlier, we are really a closely regulated organization,
16 because the government takes the view that the members
17 of the Board of Directors are composers, writers and
18 publishers competing with one another, and on the
19 distribution side, the government feels that they
20 should not be permitted to disregard the distribution
21 rules. Therefore, the rules are spelled out in the
22 1964 report in some detail, which is attached to
23 our statement and you might want to glance through
24 it. I don't think I would want to try to comprehend
25 it in one meeting. It is a very complicated document.

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2 We must treat all members alike because
3 of the government's view, and it is our own view too
4 that we should. They are entitled to be treated on
5 exactly the same basis.

6 When it comes to the user, as I have
7 indicated, the price fixing problem was resolved by
8 giving any user an absolute right to an ASCAP
9 license by merely writing a letter and asking for
10 it. The writing of the letter grants the license
11 automatically.

12 There is then a sixty day period for
13 negotiations, during which time either side can
14 ask the court to fix a minimum fee, and after the
15 sixty day period the user can go into the court,
16 and we have conducted our negotiations wherever we
17 could.

18 We have national organizations and committees
19 associated with the National Association of Broadcasters
20 and other associations and once a fee is approved by
21 the court we have always gotten it voluntarily rather
22 than asking for a hearing on the merits.

23 The government takes the view that because
24 BMI's board of broadcasters are not musicians, writers
25 and publishers, when they buy music, they are dealing

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2 with each individual composer as an individual
3 seller and they are entitled to deal with him
4 on the basis of making the deals most favorable
5 to BMI. In other words, if I can buy it cheaper
6 from A than from B, I should.

7 That is a curious notion to me if the
8 purpose of the existence of BMI is to furnish
9 competition. In the first place, the notion of
10 competition in this field is strange. Besides,
11 both license large repertories and users must
12 have both licenses so it is not a question of
13 competing as automobile dealers do to sell one
14 car rather than another. It usually requires
15 both licenses.

16 With respect to dealing with writers and
17 publishers, I don't quite see how you get competition
18 if you say to one organization that you have to
19 treat everyone alike and you say to the other that
20 you do not.

21 ; of money that they

22 With this, further, deponent sayeth not.

23 JUDGE FULD: Is Dr. Fagan finished also?

24 DR. FAGAN: Yes.

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2 JUDGE FULD: Dr. Dix.

3 MR. DIX: I have two really unrelated
4 questions.

5 First, I am not quite clear again how the
6 point score specified in the court order and so forth
7 gets translated into dollars. If I heard right, this
8 is in effect preferably collected by and bargained
9 in a kind of free market with the consumer?

10 MR. KORMAN: With the music user, yes.

11 MR. DIX: With the user, and then once
12 that rate is fixed so that everybody gets the same
13 rate, does this bargaining go on annually?

14 MR. KORMAN: We are not permitted to make
15 agreements for more than five years, and we normally
16 do make them for five years.

17 MR. DIX: So that there is no way with
18 respect to competition to put a ceiling on the rates,
19 the actual dollar rates for the license?

20 MR. KORMAN: Well, there is a court to do
21 it. We have the burden of proving the reasonableness
22 of a fee that we may collect.

23 We have just been asked by a radio committee
24 to quote the rate for the five year period beginning
25 March 1, 1977. We have responded as to what we think

1
2 is reasonable and we are now negotiating.

3 We do that within the context of the court
4 proceeding. The court says, "Please fix an interim
5 fee and continue at the old rates."

6 Now, the judge who handled the ASCAP suits
7 for many years was Sylvester J. Lyon and each judge
8 has his own style.

9 It was Judge Lyon's style to change it and
10 to say, "Tell me what this is all about." He would
11 hear both sides and he would make some suggestions
12 and he would really bang heads together and would
13 suggest that they ought to follow out the suggestions
14 or they would come out in left field. It was hammered
15 out in that fashion.

16 MR. DIX: The other question has to do with
17 the sampling technique.

18 Do you have any idea of what the ratio is
19 between the total number of performances of individual
20 works and the sample count of individual works? In
21 other words, do you catch one performance in 10,000
22 or one in 100?

23 DR. FAGAN: It is not that easy a question
24 to answer and it is not that easy a concept usually,
25 because a performance of a large station is thought

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2 of as being more important than a performance on a
3 small station, and more of those performances on a
4 big station are common, so that if you only performed
5 on very large stations your proportion would be as
6 actually counted in the survey a lot more than if
7 you had performed only on small stations.

8 MR. DIX: Let's take the fellow who doesn't
9 show up in the sample. He gets no money?

10 MR. KORMAN: We have a lot of those.

11 MR. DIX: And they are not very happy
12 about it, I guess. I just wondered how you convinced
13 them that your sample was adequate. For instance,
14 "My uncle was in Iowa and he heard me on radio and
15 you didn't give me a nickel." How do you deal with
16 that kind of thing?

17 DR. FAGAN: It's a very difficult question
18 to deal with. Each member would say, "Gosh, you
19 licensed my work. I heard a performance of my work
20 and I didn't get paid anything and I was there. How
21 come?"

22 MR. DIX: You see, the reason I ask this
23 is I want to make a parallel between any sampling
24 one might do in the photocopying field where people
25 in a sense are really concerned about what happens

1
2 with the small circulation journal, but I suppose
3 there is no parallel.

4 DR. FAGAN: It's a tough one. People as
5 a group would much prefer that we increase our
6 sample dramatically. As a matter of fact, they
7 would have us, I think, increase the sample so far
8 that there wouldn't be any money left over to
9 distribute to anybody if you caught a performance
10 or two a day. It is a very difficult area.

11 We do have a fund which has been set up
12 for awards, which are administered by awards panels
13 whose members are not members of the society, and
14 their purpose is to make awards to people whose work
15 is performed in areas which are not surveyed -- for
16 example, material that is only used in these bars
17 and grills or restaurants and so on, and also members
18 whose works of distinction make distinctive contribu-
19 tions to the repertory.

20 This does not deal with the problem that
21 you have just raised.

22 MR. KORMAN: The number of network performances
23 is not so great and the network furnishes details,
24 so that any member of ASCAP who has a work performed
25 on any television network is paid that percentage.

1
2 The problem is greater with respect to the local 1
3 television performances.

4 We are under what percentage in local
5 television?

6 DR. FAGAN: About two percent.

7 MR. KORMAN: About two percent / sampled is

8 Dr. Fagan's guess at the moment.

9 On local radio there are so many more
10 performance ranges, and we talk about three thousandths
11 of one percent, so it is a quite small sample in local
12 radio.

13 The music business changes so much. We
14 used to have radically different programming by
15 different types of stations, and nowadays, in the
16 case of music, the same kinds of compositions are
17 played on all stations and there is a trend, such as,
18 for example, if a country hit song shows up as a hit,
19 and then there is also the example of "What a Difference
20 a Day Makes," an old standard which made a great
21 difference in the rock music group last year, and
22 now there is a country version that has just come
23 out.

24 MR. DIX: Thank you.

25 MR. KORMAN: Let me just observe that you are

1
2 dealing with three different kinds of clearing houses
3 structurally at the moment.

4 I gather the one that has been proposed
5 for dealing with technical, medical and scientific
6 journals would be a publishers' clearing house. You
7 have BMI which is a user controlled clearing house
8 and you have ASCAP which is a writer and publisher
9 controlled clearing house.

10 I realize you are dealing now with just
11 a small part of the problem, but our experience has
12 been such as to urge you to give very careful con-
13 sideration before you recommend a clearing house that
14 does not represent authors. When I say represent
15 them, I mean in terms of how that clearing house is
16 managed and run.

17 I don't mean that the publisher will not
18 represent the author. Of course he will. He by
19 contract must, but I mean I would go very slowly
20 before recommending that a clearing house be organized
21 in which authors do not have a voice, because if they
22 don't have a voice other than to share the proceeds,
23 there are all kinds of possible problems that will
24 arise, I believe.

25 Let me make one other observation. In terms

1
2 of what ASCAP and BMI do, we are involved in quoting
3 prices for a large volume of copyrighted works, and
4 that, of course, raises a price fixing question.

5 There are other organizations that do
6 something similar and avoid the price fixing problem
7 by not issuing blanket licenses. The Harry Fox office
8 acts as an agent for various publishers and presumably
9 goes back to the publisher before quoting and has
10 authority to quote for a given publisher at a certain
11 time.

12 If you are dealing with clearing houses
13 that are going to be issuing blanket licenses, you
14 have surely got a price fixing problem which you
15 have to consider.

16 JUDGE FULD: Mr. Lacy.

17 MR. LACY: Bernard, what is the typical
18 language in a composer-publisher contract in music
19 as to royalties and rights, particularly performing
20 rights?

21 MR. KORMAN: With respect to performing
22 rights, the understanding is, and there is a decision
23 on this point -- it is March against Taylor in the
24 New York Supreme Court -- writers and publishers
25 are engaged in a joint venture in ASCAP, and the

1
2 rights really are vested in ASCAP initially when
3 the composition is written by the writer, because
4 our agreement provides that we shall have the right
5 to license everything that he writes during the term
6 of his membership.

7 We have identical agreements with writers
8 and with publishers, and each understands that he
9 will not share in the other's performing rights income
10 from ASCAP. We pay only writers, the writers' share;
11 and only publishers, the publishers' share.

12 The writer can, by virtue of his strength
13 in dealing with publishers, have an agreement that
14 he is either a part owner with the publisher in a
15 separate corporation or that the publisher shall pay
16 over to him a percentage of his earnings and so forth,
17 but typically the publisher does not have any such
18 arrangement with the writer where the writer will
19 pay over any part of his.

20 Now, in BMI's case, they deal only with
21 publishers, and I venture to say that in the first
22 ten years of their existence better than 90 percent
23 of the money they picked up was from publishers. I
24 guess I will be corrected very shortly when Mr. Cramer
25 moves up here. I don't think they pay 50/50 now, but

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7 MR. LACY: Just to get some idea of relative
8 magnitudes, if you segregated all composers in the
9 country and thought of how much income they get from
10 performing rights collected through the Performing
11 Rights Society and how much are they getting from
12 syndication rights and how much they are getting from
13 the sale of sheet music, what sort of percentage in
14 ball park figures would you get?

15 MR. KORMAN: Well, let's see -- ASCAP and
16 BMI together collect 140 million, and let's take off
17 20 percent of that, which is 28 million, so that is
18 112 million that they actually receive.

19 I believe that about half is performing
20 rights -- that is, both writers and publishers --
21 and you add about 35 to that and it is about 150
22 million.

23 The synchronization fees are not very much
24 for use in movies and television programs and the
25 sheet music and print rights are not the kind of

1
2 money that they should be because of the sort of copying
3 problem that you deal with. It is very common for
4 high school and college bands to be performing from
5 Xerox copies of music which is generations removed
6 from the original purchase. That should be a much
7 larger source than it is and I don't have the figure,
8 though it is available and I can get it for you.

9 Let's say 200 million may be.

10 MR. LACY: We are talking about a clearing
11 house to deal with the largest basic principal sort
12 of income, which presents some different problems
13 from the one we were talking about this morning where
14 you are dealing with a relatively small marginal
15 secondary type of income.

16 MR. KORMAN: They are also dealing there
17 with writers who are more interested in prestige,
18 I am told, than in money. These people want their
19 articles to be read, and it may have something to
20 do with their economic advancement, what their wives
21 think of them, or whatever, unlike the professional
22 author who is interested in money and wants to be
23 paid.

24 MR. LACY: I have one other point that I
25 want to be clear on.

1
2 In your collection, say, for the
3 French Performing Rights Society, do you make any
4 effort to provide them with information that would
5 enable them to distribute that among individual
6 composers, or do you just given them a lump sum
7 and this is what the French repertory program brought?

8 MR. KORMAN: We give them detailed statements
9 allocating the money to the composition.

10 MR. LACY: And you get some of that
11 information from the French Society?

12 MR. KORMAN: Yes. The Swiss have been
13 appointed or volunteered and are in charge of
14 creating and maintaining for all societies a list
15 of the composers, authors and publishers of all, so
16 that we all know which people are in each society,
17 and where we are unable to identify, we correspond
18 and find out who the members and interests are,
19 whether they be domestic or foreign.

20 JUDGE FULD: Mr. Cary.

21 MR. CARY: My question has been answered.

22 MR. PERLE: I have a question.

23 JUDGE FULD: Mr. Perle.

24 MR. PERLE: From what you have said,
25 Bernie, and trying to get it into print, what you

1
2 really have is a system where you solve the problem
3 by charging them either a lump sum or a formula
4 amount and distributing that amount on the basis
5 of performances or an approximation thereof?

6 MR. KORMAN: Yes.

7 MR. PERLE: If we gave you the job of
8 setting up some sort of clearing house for prints,
9 do you think that it would be practicable to do it
10 on the same basis, charging the machine in accordance
11 with its capacity to make prints, and then try to
12 figure out some way of distributing all the work
13 that may be reproduced by them?

14 MR. KORMAN: Well, one of the interesting
15 things about this afternoon is that we came in to
16 tell you about ASCAP without knowing anything about
17 what you really had on the table in terms of the
18 clearing house.

19 It was only when we walked in that we had
20 a quick look at the AAP statement. I don't know
21 what the proposal amounts to.

22 MR. PERLE: I am not talking about the
23 AAP.

24 MR. KORMAN: Oh.

25 MR. PERLE: I want to know how you would do it.

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2 MR. KORMAN: The first question I think is
3 whether there is some way to identify the compositions
4 being copied. Is there some way to be sure that you
5 know each time a copy is made?

6 Given the Xerox machines in world today
7 which can copy without anyone knowing, the ones
8 in your office and mine, I don't know whether that
9 is possible.

10 I am sure that the Germans deal with the
11 problem in the manner you suggested with respect to
12 tape. They assume that every raw tape that is sold
13 will be used for the purpose of recording a musical
14 composition which is copyrighted, and so an additional
15 tax is assessed on the raw tape and paid over to the
16 German Society to be distributed in some fashion.
17 How they distribute it I don't know.

18 One thing I am pretty sure of is that we
19 don't get, with the flow of money into the United
20 States, the kind of money we should if there were
21 a fair count.

22 But I would like to have an opportunity
23 to think about the question you raised and discuss it
24 with Dr. Fagan, and if you would like us to offer our
25 thoughts, we will do so.

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JUDGE FULD: We would appreciate that.

MR. MILLER: In thinking about that, would you ask yourself the further question that if you were trying to translate that which you are most familiar with to the print medium, whether the total extraction should be on the manufacturer of the machine, the vendee or licensee of the machine, or the reprography paper manufacturer?

VICE CHAIRMAN NIMMER: Am I correct, Mr. Korman, that you don't attempt to keep track of performances in night clubs and similar areas?

MR. KORMAN: That's right.

VICE CHAIRMAN NIMMER: And isn't that possibly comparable to some machines not being susceptible to being kept track of, but you have reference to another, in your case, television and radio, where perhaps in the big area such as libraries one can keep track?

MR. KORMAN: Yes.

JUDGE FULD: Are there any further comments or questions?

(There was no response.)

JUDGE FULD: Thank you very much, Mr. Korman and Dr. Fagan.

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March 23, 1977

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MEMORANDUM

TO: The Commission

FROM: The Staff

SUBJECT: Performing Rights Societies - Report on a Staff Inspection of ASCAP and BMI; relevance to mechanisms for authorizing and licensing photocopying

The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are the two principal U.S. musical performing rights organizations whose structures and operations are of interest to the Commission in relation to the problem of possible mechanisms for authorizing and licensing photocopying. This memorandum reports the findings of a March 31 visit by staff members Frase, Meyer, and Peyton (accompanied by Dennis McDonald of King Research, Inc.) to the New York Headquarters of both organizations. The memorandum may be helpful to Commission members in questioning witnesses from ASCAP and BMI who are appearing before the Commission on March 31, 1977.

Both institutions perform essentially the same functions -- the receipt of payments for public performances of copyrighted musical compositions and the disbursal of such receipts to affiliated composers, authors, and publishers. They do this by licensing such performing organizations as radio and television stations and networks, background music organizations, and night clubs and similar establishments, and by collecting data on the performance of each individual work quarterly from complete logs submitted by the licensee organizations or by estimating from statistical samples the number of times that copyrighted music is performed.

Payments are made quarterly to member copyright owners^{1/} according to complex formulas whereby performances are "weighted," by audience size or by relevant revenues related to these performances.

There are several significant differences between the two organizations on such matters as organic structure, operating procedures, and the determination of which works are being performed. These differences will be noted in the appropriate sections below.

I. Structure

ASCAP is an unincorporated association which is governed by a twenty-four member board consisting of 12 composers and authors and 12 publishers elected by their respective constituencies for two year terms. Some of the 24 members hold office for significant periods of time through reelection.

BMI is a corporation whose stock is held by 500 broadcasting firms^{2/} which derive no direct economic benefits therefrom because revenues in excess of expenses are distributed to affiliated composers, authors, and publishers on a quarterly basis. The board of directors is elected by the shareholders, but the operational decisions are said to be made by the corporation management.

Both organizations operate under the terms of consent decrees resulting from the settlement of antitrust actions initiated by the Department of Justice. Because the decrees were entered on different occasions and

1/ Affiliation with both organizations is open to all whose works have been copyrighted and publicly performed. A composer, author or publisher belongs to only one of these organizations at a time. There is some movement of affiliation from one organization to the other.

2/ The shares may be held only by broadcasters; the distribution of shares is a vestige of BMI's creation in 1941.

involved different practices, their terms, although similar, are not identical. The details of the decrees will not be discussed here, but will be the subject of a separate and later memorandum. It may be noted, however, that some difference in the decrees provide a basis for competition between ASCAP and BMI.^{3/}

II. History

ASCAP was founded in 1914. The 1909 copyright act provided a performance right in music for the first time, and ASCAP was organized to take advantage of this new provision of the law. This was at a time when radio, television and piped background music did not exist and performances were predominantly live. Professor Nimmer stated the problem of collecting performing royalties as follows:

"Musical works,...by their very nature may be performed on such an extensive basis as to render it impossible for individual composers and publishers to enforce effectively their performing rights on an individual basis." ^{4/}

ASCAP had the field to itself until 1941, when BMI was formed by radio broadcasters dissatisfied with the ASCAP monopoly.^{5/} Since that time the two have coexisted, and both have been successful in returning royalties to composers, authors and publishers without excessive administrative costs. Both organizations do a large volume of business. Composers, authors, and publishers are said to shift from one organization to another relatively rarely. It is reported that there is no significant agitation in the composer, author, publisher community for changes in the present system; and that users rarely avail themselves of the right to go directly to

^{3/} For example, ASCAP is required to treat all of its members exactly alike while BMI is free to afford special treatment to certain individuals or classes of members.

^{4/} 1 Nimmer on Copyright §107.6 (1976).

^{5/} There is a third smaller U.S. performing rights society - SESAC.

copyright owners rather than to the two organizations to license performances.

Both organizations now return approximately 80% of their revenues to members in the form of payments for performances, which means that administrative expenses in recent years have amounted to slightly under 20% of revenue received. However, ASCAP was in operation seven years before it was able to begin paying royalties.^{6/} BMI is said to have been able to make payments to composers, authors, and publishers over and above its administrative expenses from the very beginning. It might well be that a proprietor's copyright clearinghouse for photocopying would find itself in the same position as ASCAP for the first few years.

III. Revenues.

Both ASCAP and BMI derive their revenues by licensing arrangements with organizations performing music publicly. There are different types of licenses available, but two forms predominate -- the blanket license and the per-program license. Under the predominate form of license - the blanket license one annual payment buys, for example, a radio station the unencumbered right to play as much BMI or ASCAP music as it likes. The contract providing blanket license are usually for a period of years. In the per-program license, payment is made for each program in which ASCAP or BMI music is used. The bulk of the revenues received - 75% or more - comes from broadcast licensees -- the television networks, 600-odd television stations, and some 7,000 radio stations. Other revenues are obtained (1) by licensing night clubs, concert halls, and other places where music is performed; (2) by licensing background music organizations such as MUZAK; and (3) from foreign performing rights societies for U.S. music performed abroad. Juke box owners and cable television systems have not been required to pay for their use of

^{6/} Testimony of Paul Marks, at a seminar on copyright clearinghouses conducted by IIA and AAP in Washington, D.C. in the spring of 1976.

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copyrighted music, but will under the provisions of the 1976 copyright act.

ASCAP and BMI devote substantial amounts of manpower and money to "compliance," i.e., insuring that all performing organizations are licensed. Federally regulated broadcasters are, of course, easy to find. They also provide the largest license fees. At the opposite end of the spectrum are nightclubs or similar organizations. They open and close frequently and their owners are sometimes unaware of the need to pay performing royalties, and may be reluctant to do so. Therefore, both organizations seek to identify and license new organizations performing music by means of field staffs. While most owners respond positively to license offers from performing rights societies, it is not infrequently necessary for legal action to be initiated to induce owners to obtain licenses. BMI initiates about 160 suits per year and ASCAP about 400. These suits are almost always settled before trial, but nonetheless require considerable time on the part of the societies' legal staffs and local counsel retained by them.^{7/}

The price of the ASCAP or BMI license depends on the size and nature of the licensee's operation. A large licensee will realize greater income from his activities (a large dance hall will receive more admission fees than a small one; a 50,000 watt radio station will receive more advertising revenue than a 500 watt one) and will find the license more valuable. ASCAP charges radio stations about 1.75 percent of their gross revenues after specified deductions and BMI 1.7 percent.

7/ Potential photocopy licensees, i.e., those who might pay a clearinghouse for the privilege of photocopying copyrighted material, might be a more or less diverse group than music performance licensees. At one extreme, there appears to be no group of photocopiers as identifiable and nationally regulated as broadcasters; while at the other there are an enormous number of organizations possessing one or more photocopying machines.

IV. Disbursement

ASCAP and BMI, as previously stated, distribute approximately 80% of their revenue to their affiliated composers, authors and publishers in the form of quarterly royalty checks, but they use very different methods to divide up the pie.

ASCAP examines performances by most types of licensees to estimate the frequency of performance and the audience exposure of all ASCAP titles. Television networks provide complete written logs of music performed, as do the background music organizations. Because there is so little of it in terms of hours per week, and because the revenues are so great, ASCAP reviews the logs of every minute of televised network airtime and audits the networks by monitoring broadcasts by the networks during sample weeks. Composers, authors and publishers receive "credits" when their works are performed, with credits being weighted according to the music's use, i.e., whether it is performed as a featured item of entertainment or is used as a theme, jingle, background, cue, or "bridge" music, all of which terms are defined in ASCAP's consent decree. Works which receive consistent play over a long period of time receive what amounts to "bonus" credits as do "serious works four minutes or longer in duration."

The same type of crediting is done for performances not on network television or used by background music organizations, but the counting is done by monitoring (taping) a statistical sample of radio station broadcasts rather than by using the complete logs submitted by the performing organizations. The sampling of radio broadcasts is done by an independent contractor who assigns people throughout the country to tape-record a prescribed six hours of airtime on certain radio stations on predetermined days. These tapes are then sent to ASCAP where they are listened to by professional music identifiers who prepare written lists of the works played, whether the works

belong to ASCAP members or not. These written lists are then checked by hand against the index of ASCAP musical titles. Based on weighting formulae, credits are assigned to composers, authors, and publishers which, along with network television and any other credits, lead eventually to the preparation of quarterly royalty checks. ASCAP does not sample concert halls, night clubs, and dance halls to determine whose songs are being performed, and how often, but distributes revenues from these sources on the basis of the performance of music by television stations, background music organizations and radio stations. In any given fiscal quarter ASCAP receives performance data concerning some 300,000 music performances. If a specific music title does not show up either on the logs or the samples during a particular quarter, no payment is made with respect to that title.

BMI also receives logs of 100% of television network performances and from background music organizations. In addition, it uses the computer tapes from which regional editions of TV Guide are prepared to examine local programming for music content in motion pictures. With respect to radio stations, BMI's method is quite different from that of ASCAP. An independent accounting firm selects a scientific sample of stations and has them keep logs of all music played during a specified week. The accounting firm carefully guards the secrecy of the list of stations to be sampled so that no one at BMI knows what stations are included until after logs have been submitted. These logs contain the title and author of all music played. Based on weights according to station size, size of audience, and the like, BMI members get credits when their works are performed. Finally, BMI obtains the printed programs from symphony orchestras and concert halls to determine the frequency performance of serious music by BMI composers. As in the case of ASCAP, BMI does not attempt to sample performances of music in night clubs and

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similar organizations, but distributes the revenues from such performances in accordance with the frequency of performances of individual titles shown in logs or in the sampling system. BMI compensates for the use of some 1,250,000 performances per quarter.^{8/}

Both ASCAP and BMI subsidize certain composers, authors and publishers. The "top 100" ASCAP members contribute a portion of their royalties to be distributed among the rest of the ASCAP members. At BMI, concert works are compensated at a higher rate than popular music.

Both organizations report general satisfaction with the counting, sampling and distribution mechanisms employed. There are said to be relatively few complaints on the order of "My mother heard my song in Omaha but I didn't get a check." This seems to be due to a general recognition that 100% counting, if possible, would be very expensive and would greatly reduce the disbursements.

In order to disburse royalties it is, of course, necessary to keep track not only of new musical works and of addresses of composers, authors and publishers, but of such events as deaths, name changes, and transfers of right all of which record-keeping must be paid for out of the revenue pool. ASCAP depends on copyright registration records for entering new musical works into its master index by hand. BMI depends primarily on its affiliated composers, authors and publishers to supply information on new works and enters this information directly into a computer data bank which serves as its master index of BMI titles. BMI checks the

8/ Although the number of titles compensated by ASCAP is ten times greater, the dollar volume of each organization is similar: ASCAP takes in approximately \$84 million per year and BMI roughly two-thirds of that. This can probably be attributed to ASCAP's age and the fact that most old standards, and indeed all pre-1940 works, are in its lists. Many of its compensated titles received very few plays per quarter.

data on performances of works against this computerized index largely in an automated fashion.

V. International Transactions

Both ASCAP and BMI are associated with more or less similar performing rights societies in other countries, from whom funds are received for the foreign performance of U.S. music and to whom payments are made for the U.S. performance of their music. There appears to be a very favorable balance of trade for American music, with both organizations receiving more money from abroad than they send overseas. About 10% of the dollar volume of BMI and ASCAP revenues comes from the performance of foreign music in the U.S.

VI. Analogies with Possible Photocopying Mechanisms

There are both differences and similarities in the ASCAP/BMI operations and those of possible clearinghouse and licensing mechanisms for photocopying. After the Commission has had the opportunity to hear and to question the ASCAP and BMI witnesses at the March 31 hearing, the staff will prepare a paper analyzing and evaluating the usefulness and pertinence of the experiences of the two performing rights societies for dealing with photocopying problems. This preliminary analysis will later need to be refined in light of data made available in the King Research Study and from other sources on the volume of photocopying and administrative costs.

STATEMENT OF
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

BEFORE

THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL
USES OF COPYRIGHTED WORKS (CONTU)

March 31, 1977

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This statement is submitted in accordance with the Commission's request and covers the eleven items specified in Mr. Frase's letter dated March 16, 1977.

1. The Structure and Governance of ASCAP

The American Society of Composers, Authors and Publishers (ASCAP) was founded in 1914 by Victor Herbert, John Philip Sousa, Irving Berlin, and other noted American writers and publishers of music. It is an unincorporated, nonprofit membership association, organized under the laws of the State of New York. ASCAP operates as a one-stop bulk licensing clearinghouse for nondramatic performing rights in the copyrighted musical compositions in its repertory.

ASCAP's members, now numbering over 20,000, sign identical membership agreements granting ASCAP the nonexclusive right to license nondramatic public performances of their musical compositions. ASCAP licenses the performing rights on behalf of its members, collects license fees from users, and distributes those fees to its members, after deducting only the Society's costs of operation.

ASCAP is governed and managed by a 24-person Board of Directors consisting of 12 writers and 12 publishers. The Board meets monthly. Writer members elect

writer Directors and publisher members elect the publisher Directors every two years. Writer members include deceased writer members whose successors share the distributions that would otherwise be paid to the member, if living. The Board elects officers annually, with the President traditionally being a writer Director. The only salaried officers are the President and Counsel. Three writer and three publisher members of the Board must be primarily concerned with "standard" music, that is, symphonic or "serious" music. Four membership meetings are held each year, two in New York and two in Los Angeles. Recently, membership meetings have also been held in Nashville.

ASCAP's day-to-day operations are supervised by the President and a Managing Director, both of whom work closely with a Chief Economist and Special Projects Manager.

The Society's work is done by many departments with specialized functions. The Membership Department processes applications for membership and furnishes information to prospective members. Every writer and publisher who meets minimal requirements must be elected to membership under a requirement of the 1950 Amended Final Judgment in United States v. ASCAP.

The Index, Program, Tape Listening, Serious Music and Royalty Departments are all involved in the

process of distributing royalties to members.

On the licensing side, broadcasters are licensed by the Broadcast Licensing Division, consisting of the Radio and Television Departments assisted by a Broadcast Accounting Department. There are about 7,700 broadcast licensees. All other licensing--bars, taverns, restaurants, nightclubs, background music operators, hotels and motels, concerts, skating rinks, and so forth--is the responsibility of the 14 branch offices which report to the National Sales Manager for General Licensing. The 14 district offices across the country are assisted by a General Accounting Department in New York. Some license fees, including local television and local radio, are based on reports submitted by licensees, subject to audit. An Auditing Department assists the licensing departments. A special Symphonic and Concert Department exists for licensing such performances.

In addition, the Foreign Department supervises the Society's relations with some 35 affiliated foreign societies whose repertories are licensed in the United States by ASCAP, and which license ASCAP works abroad.

The Information Systems Department maintains a sophisticated computer operation which functions in both the licensing and distribution areas.

The Office of General Counsel advises on all legal matters and supervises some 400-500 actions yearly

in all parts of the country. Local counsel are retained in all states.

2. The Licensing System for Musical Works by Type of Customer

ASCAP has many different forms of license agreement, each tailored for a particular type of music user in a particular industry. All are blanket licenses, granting access not only to the existing repertory, but to new works created during the term of each license. License agreements vary in rate and in rate structure from industry to industry, and are often the product of negotiations with such industry-wide groups as the American Hotel & Motel Association and the National Association of Broadcasters.

Any user who believes the fee quoted by ASCAP to be unreasonable may apply to the United States District Court for the Southern District of New York for determination of a reasonable fee. The burden is on ASCAP to establish the reasonableness of the fee quoted.

In general terms, ASCAP's licensing operations are divided into broadcast and nonbroadcast licenses, and we shall consider each of these in turn.

A. Broadcast Licensees

In television, ASCAP licenses both networks and local television stations. The network licenses extend to performances in network programs by each local station affiliate

of the network. The networks currently pay a flat dollar license fee.

Local television stations are licensed for local programs--all programs not supplied by the national networks. Two forms of license are offered to local television stations, a blanket license and a per program license. The blanket license allows the station to perform all works in the ASCAP repertory as often as desired, whenever desired. The license fee is based on the "net receipts from sponsors after deductions." The per program license is also "blanket" in granting access to the whole repertory. The fee is a higher percentage of net receipts from sponsors, but only from those local programs which contain one or more musical compositions in the Society's repertory.

Similarly, the Society licenses radio networks and local radio stations in a fashion similar to television. In addition, the Society offers a special form of license for "all talk" or "all news" radio stations.

Broadcast licensees are licensed by the Society's New York Office. Generally, broadcasters are aware of the necessity for performing rights licenses and enter into such agreements as a matter of course.

B. Nonbroadcast Licensees

There are many different forms of blanket license agreements for the many different types of nonbroadcast music users. By far the most numerous type of user is the "general establishment"--the bar, restaurant, tavern, nightclub, and similar establishment. The rate schedule for these users establishes a license fee based upon a number of different objective factors, such as the price of a drink, seating capacity, number of nights per week music is used, type of musical rendition (e.g., mechanical music, single instrumentalist, or two or more instrumentalists), admission or similar charge, alterrate music, and so forth. The rates are part of the agreement, so that the user can compute his own fee, or verify that the fee quoted is proper for his place.

Some other types of licensees include background music operators such as Muzak (whose rate is a combined flat rate for certain types of subscribers and percentage rate for others), hotels and motels (which pay at a rate based on expenditures for all entertainment), and concerts (whose rate schedule is dependent on seating capacity and price of admission).

The licensing of nonbroadcast establishments is carried out by 14 district offices located around the country.

The Society learns of music users by visits by field representatives, through newspaper clipping services, and from other licensees. The district offices are grouped into divisions, which are in turn supervised by the National Sales Department in New York.

When an unlicensed music user is located, the Society sends a letter explaining the copyright law and the necessity for obtaining a license for the performance of copyrighted music. Often a series of letters and visits are required before a license is obtained, or the conclusion reached that none will be obtained without litigation. The Society performs an educational function. We try to teach music users that copyright is a form of property, and that the creator and copyright owner deserve to be paid for the use of their property. The job of licensing is made easier the more understanding there is of the underlying notion of copyright as the author's property right.

3. The Entry of Copyrighted Works into the Index

Any work in the ASCAP repertory may be performed at any time by users having a blanket or per program license. (There are limited exceptions--certain works may be "restricted" from time to time from broadcast performances.) ASCAP acts as the clearing house for users, members and affiliated foreign societies.

A list of the Society's members is made available to licensees and prospective licensees. In addition, printed catalogues of performed works in the ASCAP repertory are available for both "popular" and "symphony and concert" compositions indicating the title, composer, author and publisher of each work. The symphonic catalogue also includes the instrumentation and duration of each work.

The ASCAP Index Department is the central storehouse for information about the ASCAP repertory. It is the repository of copyright registration information for musical compositions from the Copyright Office. Additional information is supplied by members and affiliated foreign societies. This information includes works which are unpublished, published or in the renewal term.

Approximately 130,000 Copyright Office registration cards are received and interfiled each year. In addition, 85,000 registration cards are received from writer and publisher members, the bulk being publisher registrations. Member registrations indicate copyright information, whether the work is original or an arrangement of a public domain work, whether the work is from a motion picture or television series, whether it has been recorded, the percentage of the member's interest in the work, and the performing

rights organization affiliation of any nonmember interest in the work.

At this time, the Society is experimenting with the use of Washington copyright registration information on magnetic tapes to be matched against performed works information in our files. We are also investigating direct on-line access to the Copyright Office to verify information.

Under arrangements with affiliated foreign performing rights organizations, the Society circulates summaries of cue sheets for music used in motion pictures and television programs. These show all ASCAP works used, combined by type of use and duration or performance as well as the members in interest. Some 11,000 summary cue sheets are circulated annually. We also circulate information concerning the most popular current ASCAP songs in the form of microfiche; approximately 400 of these are circulated abroad each year.

The Society's Index Department responds to inquiries from foreign societies received in the form of computer printouts. In such instances the request is to identify works and if there is an ASCAP interest involved, the Society responds with fiche showing the title and interested parties. We estimate that 22,000 of these are circulated annually.

Through international agreement, a list of members of all societies is maintained by SUIA, the Swiss performing rights society--this is the CAE list (Compositeurs, Auteurs and Editeurs). Each participating society updates its roster indicating new members, resignations, terminations, and the like. This aids in identifying interests in works for royalty distributions.

Records relating to foreign works being sub-published in the United States by ASCAP publisher members are maintained also by the Society's Index Department.

This branch of the Society's operation also services licensees and the general public directly. Broadcasters, particularly television networks, will ask for clearances to use new works if the licensee is unsure as to whether a work is in the ASCAP repertory. Prospective users of the repertory make inquiries regarding works licensed by the Society. The Index Department responds to inquiries from writers of books and magazine articles, record companies, television and motion picture producers, AGAC--the composers' and authors' organization--and the Harry Fox Agency, the music publishers' organization which licenses mechanical reproduction rights in musical works.

4. The Logging, Sampling and Monitoring System
to Determine the Number of Performances of
Individual Works

An ASCAP member's distributions are based primarily on the performance of the member's works by the Society's licensees.

There are approximately 37,000 ASCAP licensees and hundreds of millions of performances of some 20,000 members' works. Last year the Society's domestic receipts were over \$80 million. However, were the Society to attempt to log and identify every performance, the cost would exceed the Society's revenues. Therefore, the Society uses a survey of performances which forms the basis for distributions to members. The purpose of the survey is to distribute the Society's revenues scientifically, equitably and economically. The 1960 Order in United States v. ASCAP sets out in detail the distribution rules and, in Section II, provides the general guidelines for the survey.

The survey includes a complete census of all network television performances and a sample of local television and local radio performances. (Network radio has become largely a news feed to affiliates.) In media other than broadcasting, the survey encompasses symphony and concert performances, educational licensee uses and background music services (e.g., "Muzak") performances. All licensed

symphony and concert performances are included; performances in the remaining areas are sampled.

Independent survey experts, now the Robert R. Nathan Associates, are responsible for the design of the survey. They also audit the mechanics of the survey, determine the radio and television stations to be included in the sample and assign the number of sampling units for each station.

Another outside firm, Research Consultants Inc., schedules sampling units.

Basic data required by the survey consultants is provided by the ASCAP staff. As will be discussed later, performance data is obtained and processed by ASCAP.

Special Distribution Advisors appointed by the Court under the 1960 Order in United States v. ASCAP review the survey and distribution system. The present advisors are the Honorable Warren Olney III and Leo Kaplan, Esq.

Music information is obtained by programs and logs from the following surveyed areas:

(a) the three television networks furnish two types of programs or logs--(i) detailed program logs for some programs listing titles of the works, writer and publisher names and type of music use and (ii) logs of a more general nature for programs such as syndicated shows or feature films, where the music use information

appears on logs or cue sheets furnished by non-network sources, the producers of shows. Because all network performances are counted in the survey, audio and video tapes of network programs are made by the Society from time to time to verify the accuracy of the information received.

(b) symphony and concert licensees and educational licensees submit concert programs of music performed. As mentioned earlier, educational performances are sampled; symphony and concert performances are included on a census basis.

(c) background wired music service licensees--the major licensees such as Muzak submit logs--lists of their music libraries, showing titles, writers and publishers. These are sampled.

No logs are received from radio stations. They are taped in accordance with the sample design and instructions from the outside survey experts. There are approximately 7,000 radio licensees, AM and FM--some big, some small, many specializing in certain types of music. There is no FCC requirement that stations keep logs showing the music performed.

Sixty thousand (60,000) hours of local radio tapes are taken each year--the taping unit is six hours. Each

station may be included in the sample; stations paying license fees in the amount of \$10,000 and more are sampled annually, those paying \$20,000 are taped twice as often as those paying \$10,000 etc. The sample of stations paying annual license fees under \$10,000 is designed on the basis of groupings by geographic region, and type of community--rural, urban, etc.--following U. S. Census Bureau groupings. They are sampled on a random basis.

The outside consultants send the taping schedules directly to people in the field all over the country so that neither the stations nor the New York office staff know which stations are to be taped or when.

The radio tapes are analyzed in New York by skilled "music monitors" who listen to the tapes and identify works played, type of music uses and performing artists. (Music uses are generally divided into theme, background, cue or bridge, jingle and feature uses.) Should the monitors not be able to identify a musical composition, a solfeggist (musical expert who is trained in taking musical dictation and who can search the files for the composition with this particular set of notes) then listens and attempts to identify the tune, using the catalogue system developed and updated regularly by the Society. The catalogue referred to is similar in design to a dictionary or encyclopedia, except

that, in place of starting with the letter A, Aa, Ab, etc., the songs are listed in order of Do, Do Do, Do Re, etc. The principal tune of a song can generally be identified by reference to the listing in the music catalogue. As soon as the work in the catalogue is identified, any earlier playing is also identified and properly credited to composer and publisher. The songs that remain unidentified remain on file and are often identified later.

At this time, the Society is engaged in an experiment of trying to obtain accurate logs from the larger radio stations without prior notification as a possible substitute for tapes.

Local television station performances are sampled by means of audio tapes, TV Guide, and cue sheets. There are approximately 700 local television licensees.

Thirty thousand (30,000) hours of local television are surveyed each year. The sample unit is three hours. Network programs which may be picked up on local affiliated stations are not included in the sample. The same license fee criterion and U. S. Census Bureau groupings are applied in the local television survey as in radio.

In the cities in which the Society has offices, the sample employs tapes, TV Guide, and cue sheets. In other areas, TV Guide and cue sheets are used. As in the

case of the radio survey, music monitors analyze local television tapes.

Logs are made up for syndicated programs appearing in TV Guide from cue sheets previously furnished. If necessary, the Society will write to a local station in an effort to identify the music used in locally originated programming.

Because of the prohibitive cost, no survey is taken of the performances of the some thirty thousand diverse general licensees of the Society. These licensees include nightclubs, bars, hotels, etc. The survey experts have concluded that feature uses on radio and television are representative of performances in these general diverse areas and the license fees from these areas are distributed on that basis. (We refer to the different uses of music later in dealing with the distribution of revenues to members.)

Having given some idea of the index of musical works maintained by the Society and our survey of performances of musical works by licensees, we shall explore briefly "the matching of performance of all musical works with the index of ASCAP works," the next subject in the Commission's March 16 letter.

5. The Matching of Performance of All Musical Works with the Index of ASCAP Works

Once surveyed performances are reduced to logs for programs appearing in the survey, the title of the work known, the next problem is to identify the writers and publishers of the work.

The Society maintains a mini-index of performed works--hundreds of thousands of works--arranged alphabetically by title. This performed works index is maintained on cards, each title having a computer code number. For each title, the writers and publishers in interest are listed together with the share of the work claimed and the organization licensing the performing rights of each interest. These cards may contain such additional data as phonograph record information--performing artist, the name of the television series or film for which the work was created and year of copyright.

The first time a work appears in the survey, research must be done to determine the parties in interest. Researchers review copyright office registrations, phonograph record information, cue sheets, writer and publisher registrations and, when required, correspondence with ASCAP members or foreign societies. When basic information is established a card is prepared for this mini-index.

The work having been identified, its title code number and type of music use symbol are entered manually

on the log. The Society has been experimenting with the use of computers to aid in these procedures. In the very near future, we expect to have the computer automatically assign title codes and music use symbols to all works whose titles have unique spellings, i.e., works having unique titles.

6. The Formulas for Payment to Composers, Authors and Publishers

ASCAP is a fifty-fifty writer and publisher organization. Not only is the Board of Directors half writer and half publisher, but distributable revenues go half to writers as a group and half to publishers as a group.

Music uses vary and the 1960 Order specifies the kinds and degrees of distinctions ASCAP may make in valuing different uses. These rules are applied uniformly to all performances for all members. Unlike other United States licensing organizations, which are not owned and managed by writers and publishers, there are no special "deals" for favored writers or publishers.

In ASCAP the value of a performance is expressed in terms of "performance credits". In the broadcasting and background music areas, a feature performance, such as a visual-instrumental or vocal performance, is valued at 100% of a credit. This credit is multiplied by applicable sampling and economic multipliers, to produce the total per-

formance credits allocated to a given performance. Accordingly, the performance credits earned for the same use of the same work may vary depending on various survey factors. For example, the same performance of a work on network television will produce more credits than a surveyed local television station performance.

Fractions of the credit awarded to feature performances are awarded to performances of compositions as theme, or jingle or as background, cue or bridge music. Different credit is awarded to repeated uses of the same work on the same program and different credit may be awarded to uses of works depending on the prior history of performances. The time-of-day and day-of-week of network television performances will affect the value of those performances.

In the symphonic and concert area, factors such as length of performance and size of performing group affect the value of a performance.

Each quarter, writers receive statements listing their works performed in radio, television and wired music and the performance credits for each work represented by their interest in each work. Similar statements are furnished for symphony and concert performances once a year.

The guidelines for crediting performances to writers and publishers are to be found in the "Weighting Rules" which are part of the 1960 Order. These rules are

specified in detail in the "Weighting Formula." Copies of these documents appear in the August 1976 printing of the 1960 Order attached to this statement.

At the outset, we noted that after operating expenses are deducted, the Society's distributable revenues each quarter are divided in half, so that writers share in 50% and publishers share in the remaining 50%. We have now seen that the measuring unit of a member's participation is the number of his or her performance credits.

Each quarter total performance credits for writers as a group, and for publishers as a group, are divided into the respective dollars of distributable revenue to yield the value of a performance credit for each group.

The writers in ASCAP have determined the bases for distributing writer royalties and the publishers have determined the basis for distributing publisher royalties, both with the approval of the government. On the writer side, up to 5% may be set aside for Special Awards, made by outstanding nonmember Awards Panels of experts, for works not performed in media surveyed by the Society (e.g., special material for nightclub performers) or for works having unique prestige value for which adequate compensation would not otherwise be received.

Under the 1960 Order and the Writers' Distribution Formula, newly-elected writer members of the Society receive

distributions on a "current performance" basis and subsequently may elect to receive distributions either on the current performance or a "four fund" basis. (See 1960 Order attached.)

Regardless of choice of distribution, writer members receive royalties quarterly based on a continuous four calendar quarters of surveyed performances. The continuous four quarters consist of the then most recent survey quarter (which is three quarters prior to the distribution quarter) plus the three prior survey quarters. For each quarterly distribution, the most recent survey quarter is added and the oldest of the four survey quarters last used is dropped.

The Current Performance Plan basically distributes money to a writer based on his performances over a year. Performance credits multiplied by the quarterly "point value" of a credit determine the amount of the member's distribution.

Members on the Four Fund basis participate in the Society's current distributions in part on a current performance basis and, for the larger part, on the basis of an average of performances over a period of five or ten years, with added factors--such as length of membership--also taken into account.

The advantage of the Current Performance basis of royalty distributions is the speed of payment. The Four Fund

basis provides the advantage of averaging good years with bad years.

The writer distribution system has two unique features which may be of interest to you.

(1) The top 100 writers (approximately) in ASCAP have voluntarily agreed to place a limit on their quarterly earnings so there will be more money available for distribution to members with fewer performances; and

(2) All writer members have agreed to set aside an amount not to exceed 5% of the total distributable writer revenue for the purpose of making the special awards referred to above. Lists showing the names of recipients and amounts of the awards made by outside panels of musical experts are available to any writer member on request. (Until this year, they were mailed to all writer members.)

Publishers have just one plan for distributing royalties. (See Publishers' Distribution Formula in 1960 Order attached.) Briefly, distributions to publisher members are made on an "on account" basis in the first three of the four distributions which make up a fiscal distribution year. In the fourth and final distribution of the fiscal distribution year, a yearly

credit value is determined and this credit value is the same for all publisher members of the Society for that year.

The reason for this "on account" method of computation is that the Society's licensees pay us with varying speed during the year. Having a yearly credit value eliminates the possibility that someone who had a hit song in a quarter when licensee payments were slow (or, when unusually large payments were received) will be unduly penalized (or rewarded) by receiving payment based on a lower (or higher) credit value in that quarter.

In the first quarterly distribution in the distribution year for publishers, the total distributable revenue for the quarter is divided by the total performance credits for all publisher members for that performance quarter--establishing the "on account" value of a performance credit. In the second distribution quarter, the "on account" credit is established by taking the total distributable revenue for two quarters (six months) and dividing by the total performance credits for the two quarters and so on until four quarters of revenue and credits are used to compute the final annual credit value.

7. Reciprocal Arrangements with
Foreign Performing Societies

The Society's arrangements with foreign societies were the subject of a Government antitrust complaint in 1947. A consent decree was entered into in 1950 dealing with ASCAP's foreign activities. Technically, the Society has uni-lateral rather than reciprocal arrangements with foreign societies--our grant to a foreign society must expire at least six months after the expiration of the foreign society's grant to ASCAP. This provision, apparently intended by the Government to protect foreign societies from ASCAP's potential abuse of its power was misunderstood by the foreign societies who believed it was intended to put them at a disadvantage.

At the present time we have agreements with some 35 foreign societies; foreign receipts in 1976 were just under \$14 million. ASCAP grants each foreign society the right to license its entire repertory. The foreign societies do the same, except that they may exclude specific works which are to be licensed in the United States through another licensing organization--BMI or SESAC. In nearly all other countries, there is only one performing right society, the United States and Canada are unique in having user-controlled licensing organizations, BMI and BMI Canada, Ltd.

The 1960 Order provides that foreign revenue is to be distributed to members on the basis of the performances reported by a foreign society, if the revenue from that society exceeds \$200,000 per year, and its reports to ASCAP allocate amounts paid in reasonably identifiable form, by indicating performed works and ASCAP members in interest.

The Society now receives more than \$200,000 per year from Austria, Australia, Belgium, Canada, Denmark, England, France, German Federal Republic, Holland, Italy, Japan, Spain, Sweden and Switzerland. Royalties from these countries are distributed to ASCAP members on the basis of the performance information provided by the respective local societies.

If ASCAP's total annual revenue from a given country is below \$200,000 per year, distribution of revenue from that country is nevertheless made on the basis of the reports received from the local society if such reports identify the performed works and the ASCAP members in interest.

The reports received by ASCAP from foreign societies, other than Canada, which identify the titles of performed works and the names of ASCAP members in interest are used as a basis for distributing revenue from foreign sources which do not provide such detailed identification.

While the Society also receives more than \$200,000 per year from Canada, and the Canadian Society furnishes iden-

tified reports, performances in Canada are the basis for distributing Canadian revenue only and are not used as a guide for distributing payments received from other foreign sources.

For the last two years, the Society has received magnetic tapes from foreign societies and has developed the capability of identifying titles and members in interest for most performances directly by computer. Statements of foreign performances are furnished members twice a year indicating the country and foreign society reporting royalties, the title of works performed and the dollar amount of royalties being remitted for each work.

8. Enforcement Procedures

While the Society attempts to educate music users about the necessity of obtaining licenses to perform copy-righted works, and while our efforts are usually successful in achieving that end, there are always a number of music users who refuse to take licenses or licensees who refuse to pay their license fees. Members of the Society grant ASCAP the right to sue infringers in their names.

Users who refuse to enter into license agreements are usually "general establishments" and the Society goes to considerable trouble and expense in sending a series of letters and informational brochures, and in sending representatives to make personal calls to impress upon the user the importance of securing a license and the risk of an action for copyright infringement the user faces if no license is secured.

When efforts to license the user are not successful, the Society obtains evidence of copyright infringement. In the case of broadcasters, the Society will engage an individual to make a tape recording of the station's broadcasts, with an accompanying log of all music performed. In the case of a general establishment, the Society will engage a team of local musical experts (such as music teachers or students, or church choir directors) to go to the prem-

ises where music is being performed and make a list of all of the music performed.

The Society retains legal counsel in every state and complaints for copyright infringement, drawn in New York, are forwarded to local counsel who again make an effort to settle the claims amicably before proceeding with the lawsuit. The Society now brings about 400 to 500 such infringement actions every year, and for many years brought more than 300 such actions. The overwhelming majority--over 99%--are settled before trial. It has been our experience that, once an attorney is involved, he will inform his client that there is no defense to the action and the matter will be settled.

Since the copyright law sets minimum statutory damages at \$250 per infringement, the Society is very careful to limit the number of infringement counts upon which it brings suit so that a judgment or settlement will be reasonable. In the case of general establishments, the settlement amount is usually the amount the establishment would have paid had it been licensed when first contacted, but not more than two years earlier, together with the Society's expenses in obtaining evidence of copyright infringement and bringing the action.

Most broadcasters are aware of the copyright law and the necessity for obtaining a license from ASCAP. Occasionally, a broadcaster will fall behind in payment of

license fees, and the Society is usually willing to enter into some form of liquidation arrangement that allows the balance to be paid over a reasonable period of time. However, when the broadcaster refuses to pay the license fees it owes, the Society will terminate the station's license pursuant to the provisions of the license agreement which allow termination upon breach and default. Once the license is terminated, the procedure in bringing a lawsuit for copyright infringement is the same. The Society may also sue on the contract. The Society expects the broadcaster to pay all the license fees that would have been due had it been licensed plus an additional sum for interest and expenses.

9. ASCAP Revenues by Type of Customer

The Society's receipts for 1976 were as follows:

TV	\$ 42,900,000.00
Radio	24,400,000.00
General establishments and background music	10,600,000.00
Symphony and concert	500,000.00
Foreign	13,700,000.00
Other (interest and member dues)	<u>1,900,000.00</u>
Total	<u>\$ 94,000,000.00</u>

10. ASCAP's Costs of Operation with Costs Broken
Down to the Extent Possible by the Com-
ponent Parts of the Operation

The ASCAP cost of operations for 1976 was just under 20% of total receipts or \$18.8 million. We do not publish departmental costs. If particular types of costs are vital to the Commission, we would try to accommodate you on a confidential basis.

11. The Guidelines for ASCAP Operations
in the Consent Decree

A. Licensing Operations

The Amended Final Judgment provides a mechanism by which any music user can ask the United States District Court for the Southern District of New York to determine a reasonable license fee if it feels a license fee quoted by ASCAP is unreasonable.

Any user may obtain a license from ASCAP merely by submitting a written application for a license. The Society must then advise the applicant in writing of the license fee it believes reasonable. A mandatory 60-day negotiation period follows, during which either the user or ASCAP may ask the Court to fix an interim license fee. That fee is subject to retroactive adjustment when a reasonable fee is finally determined.

If negotiations are unsuccessful, the user (but not ASCAP) may then apply to the Court for the determination of a reasonable license fee. In any such proceeding, the burden of proof is on ASCAP to establish the reasonableness of the fee quoted. Once a reasonable fee is determined by the Court, ASCAP must offer licenses at that fee to all other similarly situated users, but the court-determined fee does not affect licenses previously made.

The Amended Final Judgment contains several other provisions relevant to licensing. For example, radio and television networks and wired music systems which offer simultaneous performances with their affiliates or subscribers are entitled to obtain a license which covers not only the performances of the network or wired music service, but also the performances by each individual station affiliate or subscriber.

ASCAP is also required to license all the works in its repertory, and may not license specified individual works unless requested to do so by both the user and member(s) in interest. Broadcasters are also entitled to choose between blanket and per program forms of license agreements. Finally, the Society is directed to use its best efforts to avoid any discrimination which would deprive licensees of a genuine choice among various types of licenses.

The success of the Amended Final Judgment in guiding ASCAP's operations is demonstrated by the fact that, in 27 years, no petition for determination of reasonable license fees has ever resulted in a full hearing on the merits. Rather, our experience has been that the Judgment's procedures provide the basis for negotiations between the parties, with the aid of the Court, that have invariably resulted in a mutually satisfactory license agreement.

B. Membership Operations

The only guideline for the distribution of royalties to members under the 1950 Amended Final Judgment is that distributions be made primarily on the basis of performances of the members' works as indicated by objective surveys of performances.

That guideline was transformed into detailed rules in the 1960 Order, which has been amended on 9 different occasions since 1960, as experience taught that change was required in the best interests of the membership.

Frequently these have been detailed technical changes affecting the credit awarded to specific music uses. Such changes, of course, are made only on consent of ASCAP and the Department of Justice and with the approval of the District Court. Members are given advance notice of each proposed change and an opportunity to appear as friends of the Court to express their opinions on the proposed changes. They may also consult the court-appointed Special Distribution Advisors, Messrs. Olney and Kaplan.

In addition to the Board of Directors, there are Writer and Publisher Advisory Committees who meet with the Society's President, top management and Counsel at least twice a year, to hear reports, raise questions and make suggestions about all aspects of ASCAP's operations.

In addition to the opportunities afforded members to voice opinions at meetings, in Court, to Special Distribution Advisors and to Advisory Committees, if a member is aggrieved by the distribution of revenues or by any rule or regulation directly affecting distribution of revenues, he or she may protest initially to the independent Board of Review made up of members of the Society elected by the membership, none of whom may be a member of the Board of Directors, and, then, if dissatisfied with the written decision of the Board of Review, an appeal may be taken to a panel designated under the rules of the American Arbitration Association. There have been only 27 matters decided by the Board of Review in almost 17 years. Only a handful of these were appealed to the American Arbitration Association Panel.

We hope this statement will furnish the Commission with the information it seeks as to how writers and publishers cooperate in ASCAP. We shall be happy to be of further assistance if the Commission so desires.

Respectfully submitted,

Bernard Korman, General Counsel
Paul F. Fagan, Chief Economist
and Special Projects Manager

For the American Society of Composers,
Authors and Publishers

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How the ASCAP Survey Works — **A Basic Primer**

The ASCAP survey of performances is complex, but the explanation below isn't. This is a primer — a simplified report on the basics. A more complete and detailed presentation of the survey has been available in pamphlet form and is currently being updated.

(1) ASCAP's only business is *music licensing*. What the Society licenses is the right to *public performance* [for profit?] of the members' *copyrighted musical works*. ASCAP's income comes from license fees, and the purpose of the survey is to allocate to the members all distributable revenue (a) fairly, (b) scientifically, (c) economically.

(2) What ASCAP licenses are performances. The rule of thumb — in the most simplified language — is that *a song must be played to get paid*. It shouldn't surprise anyone that stations that pay \$20,000 a year are surveyed more frequently than stations that pay \$2,000 a year.

(3) There are a great many thousands of ASCAP-licensed users who deliver to the public — in many different ways — hundreds of millions of performances of our thousands of members' numerous copyrighted musical works. The cost of logging and identifying every performance would exceed ASCAP's total income — leaving nothing to distribute to the members. The logical and economical solution is a carefully designed sampling system, and that's a key part of the ASCAP survey. It also includes a complete "census" of network television performances.

(4) A proper sample is an accurate scale model, a precise miniature of a big totality. The test of a well-designed sample is the most reliability for the money. That is the dominating goal in the design of the ASCAP survey.

(5) The survey works in two stages. It first determines what was actually played and where, then what was the value of that performance. How ASCAP figures out what an individual performance is worth will be treated in a future article on the distribution system. It can be said that:

(a) *all members are equal* — if A's song is given a feature performance on Carol Burnett's network t.v. show in the third week in October and B's gets a feature performance on the same show both receive the same credits.

(b) *all performances are not equal* — A Feature performance on a network t.v. show in prime time is "worth" more than a performance on a small radio station because the t.v. network pays ASCAP a lot more money.

The survey is designed and monitored by the Society's independent survey experts, an internationally renowned firm of economic consultants. In addition, the survey and distribution system is reviewed by the Court appointed Special Distribution Advisors, The Honorable Warren Olney III and Leo Kaplan, Esq. Their assistance in dealing with questions raised by individual members in this area has been invaluable.

The impartial professional economic experts who shape the survey have developed *various ways of surveying the many performances offered by the various types of music "users"* — those who take out ASCAP licenses. Experience has shown that a sampling method that would work well for one category of "user" might not be nearly as accurate or practical with another.

(6) What are the broad categories of "users"? The broadcasters represent one large group of ASCAP customers. This user category can be sub-divided into (1) television networks (2) local t.v. stations—including many that have some affiliation with a network and carry varying amounts of network programming, (3) local radio stations and (4) network radio. Network radio has declined over the years as a medium on which music is performed.

In round figures, ASCAP licenses roughly 7,700 broadcasters and a great many thousands of customers who don't broadcast. The latter can be classified generally as (1) wired music systems such as Muzak etc. (2) a variety of "symphony, concert and/or educational" operations, (3) hotels, night clubs, bars, etc. and (4) a diverse assortment listed as "other"—which includes airlines, football stadia, etc. People tend to forget the "other", but it numbers well over 5,000 licensees. As most members know, the ASCAP licensing staff is divided into two teams — one serving broadcasters and the other dealing with everyone else. In due course, ASCAP TODAY will report on licensing in a separate article next year.

How does the survey treat each of these categories?

NETWORK TELEVISION

(7) The three U.S. television networks send in program logs on some programs, lists that specify exactly what music was used — *either as feature performance, theme or background*. On other shows, such as feature films, the networks indicate what the programming was and ASCAP can identify the music through logs and cue sheets supplied by other sources such as the producer of the movie. Similar cue sheets are also secured from the producers of syndicated shows and other programs.

Since anyone can make mistakes and the survey has to be accurate, information that comes in from sources outside the Society is spot-checked as a routine precaution by means of audio and video tapes.

LOCAL RADIO

(8) The t.v. networks are big and well-staffed organizations that are used to keeping records of many phases of their business. Local radio stations come in all sizes, including some that are almost "mom and pop" operations in that they employ only five or six people and there is no FCC requirement that stations keep logs of music use. ASCAP samples local radio by taping. The Society has begun testing the feasibility of using both tapes and station logs in its survey.

(9) ASCAP has been taping for more than a quarter of a century, first experimentally and then on a regular basis for nearly two decades. Today, the sample includes 60,000 hours of local radio each year. Every local radio station has an opportunity to be included in the sample each year, and a station that pays \$20,000 is taped twice as much as a \$10,000 customer and a \$40,000 user twice as much as that.

(10) The taping unit for radio stations is six hours. The design of the survey is such that some stations are taped only once or twice in a year, and others are covered more often. Some of the smaller stations may not be sampled this year, but may be next year. *The taping covers both AM and FM stations, of course.*

(11) *Every category of stations is sampled every year.* What are the categories? All of the stations that pay less than \$10,000 are grouped in various categories to reflect the kind of community the stations are in and the class (size of ASCAP fees) that fits it. The U.S. Census Bureau divides the country into nine census regions (geographically), and our stations are similarly classified in these nine regions. We sample all nine regions, and *the taping covers different times of the day*. The Census Bureau also uses sub-categories. Within the regions it judges the various types of counties or parishes or boroughs, and it classifies them as either metropolitan or non-metropolitan. Counties within each region are grouped so as to reflect the type of county they are, and the stations are grouped accordingly.

(12) Once all the ASCAP-licensed stations are so grouped, the survey again has to be designed to cover all the groups properly. This is the work of the independent survey experts — who are also responsible for a periodic audit of the mechanics of the survey, recommendations as to changes in design and the annual selection of stations to be sampled within each category. To minimize any chances of a selection that would be less than wholly objective, the *annual choice of stations to be sampled and the number of sampling units or tapes to be assigned is made by computer.*

(13) The actual scheduling of the taping is handled by another outside research firm, which sends instructions directly to people all over the country on which stations to record and when. The ASCAP management and headquarters staff are not notified in advance as to which stations are to be taped and when, and the stations don't know either. The reasons are obvious. If no one knows in advance, no one can attempt to "influence" the choice of music programming for the taping period. *"Secrecy" and "surprise" are essential to drawing a truly representative sample* — an accurate scale model.

(14) The tapes are sent to New York, where skilled "music monitors" at ASCAP headquarters identify the works on the tapes. Candidates for these jobs have to prove their substantial knowledge of music in listening to tapes that include a variety of musical works. Although some of the tape listeners may be very strong in one type of music, that isn't enough. If the candidate shows a good familiarity with several kinds of music, he or she may be hired as a trainee. It will be many months before a trainee is actually identifying for the survey.

These dedicated specialists do a good job. When the *New York Times* carried an article on them on April 1st, the headline read "ASCAP's Music Monitors — The Composer's Best Friends."

LOCAL TELEVISION

(15) Local t.v. stations are far less numerous than local radio outlets. ASCAP samples 30,000 hours of local t.v. each year, using TV Guide, audio-tapes and cue sheets. The "music monitors" also identify what's on the local t.v. tapes.

In the thirteen cities where ASCAP has offices, local t.v. is covered by tapes, cue sheets and TV Guide, while shows broadcast by stations in other communities are surveyed via TV Guide, cue sheets and other data we get from local stations. Since many local stations are network affiliates or carry network shows — which are already surveyed — the network programs are not included in the local t.v. sample because that would be duplication.

WIRED MUSIC

(16) Four of the largest wired music services — including Muzak which is more than half of that market — provide ASCAP with logs of what they play. These logs are sampled. Inasmuch as a very significant percentage of the music in these background wired music services' categories is performed only by these services, earnings from performances by each of these licensees is limited to the amounts paid by each of them to ASCAP.

(17) The monies received from the other, unsurveyed, background wired music licensees are distributed on the basis of radio and television feature performances. This was the proxy the survey experts found that made the most sense.

SYMPHONY, CONCERT AND EDUCATIONAL

(18) Music performed by symphony orchestra-licensees, serious concert promoters and those holding "educational" licenses is surveyed by means of the concert programs provided to the Society by the sponsoring organization or promoter. Except for those in licensed educational institutions such performances are included on a complete count basis — just as are network television performances.

HOTELS, NIGHT CLUBS, TAVERNS ETC. and "OTHER"

(19) The cost of surveying these tens of thousands of diverse licensees would be prohibitive. After some research, the sampling experts have found it is fair and workable to use feature performances on radio and t.v. as "proxies."

A LIVING SURVEY

(20) Concluding this thumb-nail sketch of the basics, there are two more items worth mentioning. First, it may well be that this primer will raise as many questions as it answers. Ask them. Drop a card or a letter, and the ASCAP staff will do its best to answer as fast and as fully as possible.

(21) Finally, the survey has to be not only practical and fair but also up-to-date to reflect today's realities in the music market place. That's why ASCAP's management and staff work with competent consultants to review the survey and propose necessary modifications. It isn't enough merely to have a new drawing of stations to be sampled each year. The design of the survey itself is under regular scrutiny so that it won't reflect yesterday's conditions rather than today's.

The music market-business and the world of delivering performances are living things, and so is the ASCAP survey. We mean to keep it alive, accurate and fair.

We will take a recess for five minutes.

(After a short recess.)

JUDGE FULD: We shall now hear from Edward M. Cramer, President of Broadcast Music, Inc., about the payments system of his organization.

Mr. Cramer is a graduate of Cornell Law School, where he was an editor of the Law Quarterly. He was a teaching fellow at NYU Law School and received his Master of Laws Degree from that school in 1953.

In 1960, he was a partner in the law firm of Cramer & Hoffinger until he became president and chief executive officer of BMI in 1968.

Mr. Cramer has long been involved in copyright law, was on the first Board of Editors of the Bulletin of the Copyright Society, and has been an officer and trustee of the society.

We welcome you, Mr. Cramer, and look forward to your remarks.

STATEMENT BY

EDWARD M. CRAMER

PRESIDENT

BROADCAST MUSIC, INC.

MR. KRAMER: Thank you, Judge Fuld.

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AFFILIATED REPORTERS, INC.

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2 I am appearing without the benefit of counsel
3 here today.

4 JUDGE FULD: We will take care of you.

5 MR. CRAMER: Thank you.

6 (Laughter.)

7 MR. CRAMER: After listening to the prior
8 speaker, maybe I should be accompanied by clergy
9 instead. However, I do have with me on my left
10 Dr. Helmut Guttenberg, who is the Vice President
11 of BMI in charge of the foreign department. Prior
12 to that time he was vice president and head of our
13 data processing section and he was originally an
14 associate of the late and great Dr. Paul Lasserfeld,
15 who was a pioneer in the area of measurement.

16 Helmut is an international authority in
17 the field of performing rights administration and
18 sampling and distribution.

19 On my right is Dr. Richard Link, who is
20 our outside consultant on samplings, statistics and
21 distribution.

22 I don't intend to respond to the comments
23 made by the prior speaker. I don't want to turn
24 this forum into a debate as to whether ASCAP is
25 better or BMI is better.

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4 Maybe we can do it on a
5 public access channel and my mother will be the
6 audience of one.

7 However, there was one error, a factual
8 one and a serious one, which I will refer to in a
9 moment.

10 There are also some minor comments I had
11 about the staff memo, but I have given those to the
12 staff and I won't go over the memo here.

13 Basically, I would prefer questions, but
14 what I would like to do is briefly tell you about our
15 structure because it really is different and, secondly,
16 in broad terms, tell you about our licensing --
17 that is our income -- and, thirdly, our distribution,
18 how we pay our affiliates and our relationship with
19 them.

20 First, as to our structure, in form, BMI
21 is a stock corporation and was organized under the
22 laws of the State of New York. Its stockholders
23 are about 500 broadcasters. Now, that is in form.

24 In fact, it is and has been since its
25 inception a non-profit operation.

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2 Its stockholders were advised 37 years ago
3 that no dividends were to be anticipated, and to this
4 date no dividends have ever been paid, and the stock-
5 holders, the 500 of them, receive no different treat-
6 ment from the 7,000 other broadcasters that we license.
7 I might add that no new stock has been issued since
8 its organization.

9 In this respect, BMI is unique. It is the
10 only major performing rights licensing organization
11 in the world not licensed along the societal form.
12 That is, it is not a co-op.

13 BMI is operated like a business, but all its
14 "profits," and I put that profits in quotes, go to
15 increasing the payments to the writers and publishers.

16 Now, in the question that will be familiar
17 to you, wherefor is BMI different from all other
18 performing licensers?

19 BMI is unique. Why is it unique? Isn't
20 it organized like the others, and why are there two
21 major organizations in the United States while in the
22 rest of the world, with some insignificant exceptions,
23 there is only one organization?

24 The answer is really in history and I cannot
25 detail that history here. Some of it is set forth

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2 in the statement which is on file with the Commission.

3 Perhaps if we were planning to go into a
4 new field, a virgin field of performing rights
5 organizations, in 1978, BMI would have a little
6 different structure. That may be. Maybe there would
7 be no BMI, but in order to understand the structure
8 and why we came into being, we have to turn back
9 the clock just a little bit and see what was it like
10 in 1940.

11 At that time there was only one organization
12 licensing performing rights in America. They had
13 had a monopoly, and that was clearly admitted, and it
14 was a classic case in that they exercised this monopoly
15 power both in dealing with the customers -- that is
16 its licensees, and in dealing with its suppliers --
17 that is to say the writers and publishers. It was
18 uncontrolled. There was no consent decree in 1940,
19 which was subsequently imposed regulating the relation-
20 ship both with users and members. There was no rate
21 proceeding in 1940 either by decree or by a copy-
22 right tribunal and, most important, there was no
23 competition in 1940.

24 The result was that although thousands
25 and thousands of writers and publishers had their

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2 music performed in the United States, only about 150
3 publishers and about 1,000 writers were admitted to
4 this exclusive club. The rest were left with a
5 naked theoretical right of performance, which is
6 very nice but was unenforceable practically speaking.
7 Their works were just performed and they just weren't
8 paid.

9 Incidentally, I jump ahead to tell you to
10 compare those figures, 150 publishers and 1,000 writers,
11 with the fact that today BMI alone represents over
12 16,000 publishers and 31,000 writers in the United
13 States.

14 Now, in 1940, when faced with what they
15 felt were exorbitant demands, 600 broadcasters
16 resorted to what they felt then was the only remedy,
17 the only practical remedy available, and that is
18 the remedy of self-help, and they formed a competing
19 licensing organization, BMI.

20 In the intervening years, BMI has grown,
21 and then, again without going into detail, the
22 hows and whys, BMI represents more writers and
23 publishers than any other performing rights organiza-
24 tion in the world, and significantly in the United
25 States more of our music, BMI music, is performed

on broadcasting than any other organization's music.

The result of this growth has been in the public interest. More music of all kinds has become available to the public because more writers and publishers have had the opportunity to get paid.

I know that it would be presumptuous of me, but most of you are familiar with the statements by the Supreme Court of the United States, both in *Mazer v. Stein* and in the more recent case, the *Aiken* case, about the importance of -- I think it is simple enough to read the one sentence from *Mazer* against *Stein*:

"The economic philosophy behind the clause empowering Congress to grant patent and copyrights is a conviction that encouragement of individual effort by personal gain is the best way to advance public welfare to the talents of authors and inventors in science and useful arts," and there is lots of language in other cases.

Now, I think that is really what has happened. We made it possible for these people to get paid. The result is a tremendous proliferation of music and I truly believe in the public interest.

Now, since this is the only time I will

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2 respond to a specific comment by Mr. Korman that is
3 factually completely in error, he said that when
4 the ASCAP rates were down because of the BMI competi-
5 tion, our rates were down too.

6 You don't even have to have a pencil and
7 paper to figure this out. It is exactly nine years
8 ago today that I became president of BMI. I don't
9 know whether I should be sorry or not, but that's
10 what happened. The rates at that time for radio were
11 ASCAP 2 and BMI 1.2. Add it together and it is a
12 simple 3.2.

13 Today, or as of the end of the year, the
14 ASCAP rates have dropped to 1.725, but the BMI rates
15 went up to 1.7, so the total pay is 3.7225, an in-
16 crease in the percentage paid by broadcasters, so
17 that the competition has been of benefit to the public
18 and it has been of benefit to writers and publishers,
19 and those two are interwoven.

20 Enough for our structure. I would like
21 to talk to you now about our income in broad terms.
22 How do we get the money and how do we realize it?

23 There are two general principles. The
24 first is that wherever it is possible negotiations
25 are conducted with industry representatives.

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2 That is not always possible as, for example,
3 with bars and grills. You don't have a national
4 organization. Most are statewide or local organizations
5 and they are very difficult to deal with, whereas if
6 you deal with television or radio or hotels, it is
7 possible to negotiate some kind of a deal which can
8 be recommended to their members and they can accept
9 it or not.

10 Secondly, and it is related, all licensees
11 generally situated are treated in a like manner.
12 Each of the 7,000 radio stations, for example, is
13 offered identical terms with no special deals.

14 Now, with these two general principles
15 in mind which apply to all of our licensing, I turn
16 to broadcasting as distinguished from what we call
17 general licensing.

18 General licensing is everything other than
19 broadcasting. Maybe we could call it non-broadcasting,
20 broadcasting, and non-broadcasting.

21 Broadcasting: Virtually all of the 8,000
22 broadcasters have chosen a blanket license, although
23 other forms of license are available.

24 I tried to do a little arithmetic a few
25 minutes ago, and I think less than one-tenth of one

1
2 percent have elected a program form of license.
3 A blanket license is the one that virtually all
4 broadcasters use.

5 Most of us are familiar with the term,
6 "blanket licensing." I note that in the Whitford
7 Report, on a proposed revision of the English Copy-
8 right Law which you may have which was released about
9 two weeks ago, there are repeated references to
10 blanket licensing in connection with the subject
11 under discussion here today.

12 Now, blanket licensing: A blanket license
13 gives the user access to the entire repertory for
14 the payment of a fixed fee.

15 Sometimes for one
16 admission price you can ride any ride in the park.
17 For one admission price you can take as many fish
18 as you want out of the pond. That is the theory
19 of the blanket license.

20 The licensee need not apply for a license
21 for the performance of an individual composition
22 nor, and this is quite significant from a practical
23 point of view, no record keeping is really required,
24 and that can be quite burdensome for a small user.

25 In broadcasting, radio or television, the

1
2 fee is a percentage of the station's revenue after
3 certain deductions.

4 I do not, for this purpose, want to go
5 into what the fee is, and if it is relevant you
6 can ask me, but it is a percentage of the station's
7 fee, and that has been the general approach that
8 broadcasters have had at least since I have had
9 anything to do with it. They have not come up with
10 any alternative in dealing with stations. All we
11 fight about is how much.

12 In the field of general licensing -- that is,
13 non-broadcasting -- here too virtually all users
14 elect a blanket license, although occasionally they
15 may resort to a license for individual compositions,
16 called a per piece license.

17 That is feasible when you are dealing in
18 concerts, for example. You may not want the entire
19 repertory. It is a single concert, but that is
20 different from the broadcasting, so that occasionally
21 you do have a request for a per piece license in the
22 general licensing area, although not frequently.

23 Now, what about the fees in the general
24 licensing area? Here the fee structure varies to
25 suit the particular class of user. For example, in

1
2 some places we base it on the annual expenditure for
3 musicians and entertainment, sometimes the number of
4 seats in the arena, and sometimes the number of
5 speakers. It varies. There is no hard and fast
6 rule, and if somebody were to come up to me tomorrow
7 and wanted to negotiate a new deal and say, "I want
8 to do it on a new basis," I would be prepared to
9 listen to him. Maybe somebody who represents a
10 circus would decide that we would relate it to the
11 amount of popcorn sold. I don't know, but I am
12 prepared to listen.

13 However, that is what we do in this
14 general licensing area.

15 Now, licensing broadcasting is fairly
16 easy because we are dealing with a stable group.
17 We know that we have about 7,000 radio stations and
18 700 television stations and they are all licensed
19 by the FCC. We know where they all are. You can
20 go talk to them, grab them, phone them, whatever it
21 is, and there really isn't any major problem.

22 In addition you deal with a little bit
23 more sophisticated group of people than when you
24 are dealing with some of the general licensing
25 agreements, so most of them know that they have

1
2 a responsibility to pay for the music that they use.

3 The general licensing is a much more difficult
4 area. Here we have about 23,000 such licenses, but
5 the attrition rate is very, very high. Among bars
6 and hotels and night clubs, I'm guessing
7 that it is a turnover of about one of three every year.
8 Most of them have absolutely no idea that they need
9 a music license.

10 What we do is try to educate most of these
11 licensees to their responsibility. There is a series
12 of letters that you send them, you make a visit, make
13 a phone call, et cetera, and after exhausting these
14 procedural steps, if everything else fails then we
15 are forced to bring infringement suits.

16 At the moment, I think at last count we
17 did about 200 last year of the infringement suits.
18 Those are kind of last resort things.

19 This is a most difficult area to work in
20 and the least productive in terms of money, but we
21 have an obligation to do so.

22 About a year ago we had some of our new
23 personnel in and we asked two of the most experienced
24 men in the general licensing area to do an improvisa-
25 tion thing. What happens when you walk into a bar

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2 and say, "My name is __, and I represent broadcasting
3 music, BMI. We understand that you use music and
4 you would like a license," and so forth, and the
5 response immediately by the other fellow is, "Say,
6 listen, fellow, you've got about thirty seconds to
7 get your so and so out of here," and that is a typical
8 response, so it is a little bit different problem in
9 dealing with the general licensing area.

10 JUDGE FULD: Do you get out?

11 MR. CRAMER: I did this once, Judge, and
12 I got out, because I'm five feet seven and I'm a
13 coward, but occasionally -- by the way, seriously, here
14 there is a problem unlike Europe. There is a major
15 difference. Whereas, in Europe you get the coopera-
16 tion of the state and the local authorities, we don't
17 get that here, and it happens -- I don't know -- I
18 can't say frequently, but maybe once every two years
19 where one of our guys is really physically manhandled.

20 Now, about 80 percent of our income comes
21 from the broadcasting area and about eight percent
22 from this area of general licensing, which requires
23 an enormous amount of work. The balance is from
24 foreign and miscellaneous sources.

25 Once we get this money, what do we do with

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2 it? Since we are non-profit -- let me hold that for
3 the moment.

4 In order to know what we license and what
5 we pay for, writers and publishers submit clearance
6 forms for their work. About two hundred of these
7 come in and are processed every day. Our writers
8 send them in and publishers send them in. We get
9 the rights both from the writer and the publisher,
10 so sometimes we know about a new work being added
11 to the repertory because the publisher sends it to us,
12 and sometimes because the writer does, and sometimes
13 they both send it in. We handle it that way.

14 After a preliminary audit these works are
15 entered on our data base, and this information then
16 becomes instantaneously available, and anyone can
17 avail themselves through cathode-ray tubes located
18 throughout the company and off the premises. Some
19 of these CRT's will soon be in our branch offices.
20 A simple inquiry at the scope will tell us the name
21 of the writer, if it is BMI, will tell us if the
22 writer is affiliated with BMI and, if so, the pertinent
23 data about him or her -- that is, the address, social
24 security number, the agent's address, the affiliation
25 date, pseudonyms and the number of compositions

1
2 in his or her file, and other data.

3 A follow-up inquiry then lists all the
4 compositions. If you say he has 83, if you want
5 a list of all 83, you press another button and on the
6 tube out comes the 83.

7 Without going into detail, and some of this
8 is reproduced in the statement, similar access to
9 the data base can be had by title and by publisher.

10 We were the first major society to use
11 a fully electronic data base system, and it has
12 been fully operational now for four years. In July
13 of this year, new hardware will be installed, and
14 we look forward to improving efficiency as well as
15 a greater capacity, but even now we think we are
16 pretty good in this.

17 Some of the refinements and details are
18 in the statement and the exhibits attached, and I
19 won't go into them unless you want to during the
20 question period.

21 One thing that I think is significant
22 in considering whether you go into this type of
23 a data base and so forth, and I say this on the
24 basis of experience, and it may sound like a small
25 matter, but really, it is a big one, is the maintenance

1 of a data base. This itself is a big, big problem.

2 It is not enough to put the name of the
3 writer and the publisher and the title on the data
4 base, because the writer moves, he may die, catalogues
5 are sold, individual songs are sold, divisions are
6 made, splits are made, all after the initial entry,
7 so I merely say as a word of caution in considering
8 this that the practical application is a very, very
9 difficult one. There are constant changes.

10 Now, payment: Up to this point I guess
11 I have told you about how we obtain our income and
12 about our data base, our supply. How do we distribute
13 our income?

14 Since we are non-profit, all of the income
15 after the expenses is paid to writers and publishers.
16 I estimate that this year our expenses will be about
17 \$11,000,000 out of a gross of about \$55,000,000, about
18 a 20 percent overhead, which is roughly the same per-
19 centage that most organizations around the world have --
20 some have less, some have more, but 20 percent is
21 considered about right based on my experience with
22 all operating performing rights organizations.

23 I might add that I think that in our case
24 the percentage is a little bit misleading, because
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2 we do exactly the same amount of work our competitor
3 does, which has a larger gross, and our costs are
4 about seven or eight million dollars a year less.
5 Our gross could increase substantially now with no
6 increase in our overhead.

7 Now, basically, we pay on all performances,
8 the number of performances, and determine how much
9 the writer and publisher get paid. It is economically
10 impossible for us to count all performances on 7,000
11 radio stations, 700 television stations and 23,000
12 other users, and I think this is a problem that you
13 are faced with, and what we have come up with we
14 believe is a practical at least working solution.
15 We are continually looking for new ways, and maybe
16 one of these new areas I will talk to you a little
17 bit later on about if time permits.

18 The way we determine the performance is
19 as follows: In radio we sample. Each station is
20 required by contract to furnish us with written
21 logs. We now get them for one week, but not more than once
22 a year.

23 Some of the technical information about
24 the structure of the sample is in the report. If
25 your staff wants more detail about how the sampling

1
2 is structured, stratification and so forth, we will
3 be glad to furnish it to you, or in the question
4 period I have two experts here to tell you more about
5 it than I can. It is a sample.

6 Now, by the way, the sampling is a very
7 highly guarded secret. No one at BMI, including
8 myself, is aware of which stations are logging right
9 now. That is all done by an outside auditing firm,
10 one of the big eight accounting firms, that generally
11 preserve the secrecy of the station log, and we don't
12 get the logs until after the station finishes. Then
13 they go to the accounting firm, and then they bundle
14 them up and send them to us. That is the first time
15 we know which stations are logging.

16 VICE CHAIRMAN NIMMER: Why is that?

17 MR. CRAMER: Well, professor, it would be
18 a great temptation for certain individuals, if I may
19 use the analogy, to heat the room by putting a match
20 to the thermometer.

21 VICE CHAIRMAN NIMMER: To weight the sample?

22 MR. CRAMER: Exactly, and that is what we
23 try to avoid.

24 The stations submit these log sheets to
25 us. A copy of one of them is attached as Exhibit 4,

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2 and sometimes they come in neatly typed and sometimes
3 they come in written by hand, and so forth, but once
4 the logs come in to BMI, they are analyzed for
5 performances, and that performance analysis is pro-
6 jected from that sample and will determine what we
7 pay. That is radio.

-10 8 Television: We have to break that into
9 two. First we have network television.

10 In network television you get from the
11 three major television networks a complete listing
12 of everything that they play, so that is a census
13 and that is easy, no problem. I won't spend any
14 time on it.

15 Local television, we do a combination of
16 two things. We have entered into an arrangement
17 with a company that has access to the TV Guide tapes,
18 because the TV Guide with its 90 some editions is
19 produced by computer, and some bright fellow one
20 day said, "Why don't you have their computer talk
21 to your computer," and we said, "Yes, it's a great
22 idea," and we did, so we worked for a year and
23 devised a system whereby the same tapes that go
24 to producing the 95 editions of TV Guide go directly
25 to us and so we have a complete census of it.

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2 We have just started now and we have played
3 with it for over a year, so that we have a census of
4 what goes out over local television, but we also
5 have to sample for local originated shows. I will
6 not go into detail now, but if you wish to ask some
7 questions later on, I will.

8 So for radio, local radio, we do a sample.
9 Network television we do a census and local television
10 we do a combined census with TV Guide.

11 VICE CHAIRMAN NIMMER: What about motion
12 pictures?

13 MR. CRAMER: We pay for the music used on
14 motion pictures, and virtually every show that is
15 shown on television has music and we pay for that
16 and it is easy for us now to identify every film
17 shown on virtually every station in the United
18 States at any time.

19 VICE CHAIRMAN NIMMER: But for music that
20 does not appear on film, that doesn't count?

21 MR. CRAMER: For music that is not on film,
22 for locally originated music, for the local station
23 who has a guy who sings in the afternoon, that does
24 not help us and that is why we need the combination
25 of a sample.

1
2 This is in the broadcasting area, but what
3 do we do about the 23,000 others?

4 Well, I shake my head because I tell you
5 we have found no acceptable way of logging performances
6 by the 23,000 other general licensees, so what we
7 have done is to just make the arbitrary, and maybe
8 not so arbitrary, decision.

9 The money collected is put into the general
10 pot and we distribute the money just the same way
11 we do on the basis of radio and television performances.

12 It is our assumption that if a song is
13 generally popular around this country, that is the
14 kind of song that will be played in your local hotel,
15 your night club and bar, and considering the costs
16 involved we think that this is an acceptable compromise.
17 Sure, occasionally you get complaints but it is the
18 best we can do, and that is all I have to tell you.

19 There is an exception to this and that is
20 related to symphony concerts, because in symphony
21 concerts you do have printed programs for the most
22 important and you use the printed programs, and
23 we are able to do that. That is how we determine
24 the performances.

25 Using these techniques, we determine the

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2 number of performances and then we apply a rate.
3 The rate is set forth in a public rate schedule
4 which is given to every one of the affiliates.
5 It is not attached because the current rate schedule
6 is now being revised. It will be available, and
7 fairly soon, and when it is I will furnish copies
8 to the Commission. I didn't want to include it be-
9 cause it is already out of date.

10 The rates in that schedule are minimum
11 rates because, as I explained earlier, any "profits"
12 are distributed to the writers and publishers. For
13 example, in the payment that we are about to make
14 we will compute the statement based upon the playing
15 times the rate and we are going to pay out a 30
16 percent bonus because we have extra money, so we
17 adjust the payment rate depending upon how much
18 money we have available.

19 There is one other source of income and
20 distribution that I haven't mentioned as yet, and
21 that is the income from the performance of BMI
22 music abroad. I don't know what it will be this
23 year. It may be seven million dollars, it may be
24 more. We have agreements with 38 foreign societies,
25 and the way these agreements work is kind of simple.

1
2 For example, in England, we agree to pay in
3 the United States for British music that we like the
4 same way that we pay a BMI affiliate, and the English
5 society has the reverse obligation. They pay to a
6 BMI writer and publisher the same amount that they
7 would pay if the writer were a member of the British
8 Society. It is as simple as that and that is the
9 way it works.

10 We get accountings from abroad and they
11 are somewhat detailed. We process them, we take
12 off a small handling charge and we just turn the
13 money over to the writers and publishers, and that
14 is the foreign accounting.

15 I make it sound very simple, but actually
16 in the mechanics and the handling a lot of questions
17 arise in the management and the administration of
18 this, but in outline form that is it, a reciprocal
19 agreement and it is fairly easy.

20 Now, I have given you a brief outline of
21 what we do and how we do it, and, if you have any,
22 I would accept any questions.

23 MR. LACY: How much of your income comes
24 from the networks as distinguished from independent
25 stations?

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1
2 MR. CRAMER: I would have to compute the
3 percentage, but it is not substantial at the moment.

4 I would say radio network we can discount,
5 because radio network is no longer a factor. You are
6 talking about television network?

7 MR. LACY: Yes.

8 MR. CRAMER: In two of the three networks
9 we have no present agreements. We have interim
10 arrangements subject to adjustment, one because of
11 litigation, and the other because of negotiation.
12 I would say that it is about ten percent,

13 two of the three
14 are the subject of interim fees, so the reason I
15 answer is this way, I don't mean to be evasive, but
16 I don't treat that figure as the current figure be-
17 cause I think that they owe us a lot more money. I'm
18 trying to get it anyway.

19 MR. DIX: Does the author and does the
20 producer pay an annual fee for membership or anything
21 of the sort?

22 MR. CRAMER: At BMI the answer is no. We
23 have adopted from the very outset an open-door policy.
24 We have no restrictions and we do not charge an
25 admission fee or an annual fee, except now in the

1 case of publishers where we have a one-time \$25 fee.

2 So the answer is no.

3 MR. LACY: Apparently, a great majority
4 of the publishers are ad hoc publishers who have
5 just one or two or three pieces or one or two composers?
6

7 MR. CRAMER: Yes, yes, that is correct,
8 Mr. Lacy.

9 MR. LACY: How many major professional
10 publishers do you have, roughly?

11 MR. CRAMER: If you mean how many make
12 a living from performing rights and from music, a
13 lot of people think they are professional writers
14 and they don't make a living out of it.

15 MR. LACY: I am talking about music publish-
16 ing firms whose general business is not an ad hoc
17 arrangement to publish the works of a particular
18 composer.

19 MR. CRAMER: I guess, and it is a guess
20 subject to correction, at least a thousand -- about
21 that.

22 JUDGE FULD: Are there any other questions?

23 MR. FRASE: What is the split between
24 authors and publishers? Is it a 50/50 arrangement
25 or what?

1
2 MR. CRAMER: No, it is not 50/50. I don't
3 know because in each case we have a contract.

4 They should get paid approximately the
5 same amount for performing, but I don't know what
6 the total is. If I divide it, I don't know what it
7 is because some publishers, for example, are the
8 publishers of works where the writers are not
9 affiliated with us.

10 MR. FRASE: It is the same amount per
11 performance and the author and the publisher get
12 the same amount of money; is that it?

13 MR. CRAMER: I would say that would be
14 correct.

15 I have to equivocate on that a little bit.
16 If you will permit me a footnote exception to that,
17 the answer is yes.

18 VICE CHAIRMAN NIMMER: I just wondered
19 whether you have any suggestions and, given your
20 background in sampling in your area, as to how
21 it might be done in the photocopying area?

22 MR. CRAMER: Well, I really don't have
23 the benefit of all the input you people have so
24 it would be hard for me to make a guess, and I am
25 no more an expert on that than any person on the

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1
2 street.

3 I would say, though, that, with all those
4 exceptions that I have said, I think you are going
5 to have to come up, if you come up, with a system
6 that is going to have to be practical in the sense
7 that we made a decision.

8 We are not going to try to go out and
9 determine the performances that take place in bars.
10 We just cannot do it, so we have concentrated on
11 where we have a fixed universe.

12 Now, I have two experts here and I didn't
13 review this with them. They will probably tell me
14 I am wrong, but my feeling is that if you would
15 select a universe which is manageable
16 like a library, that is one thing, but as to copy
17 machines generally I don't know how you could ever
18 sample that.

19 A similar problem, of course, exists in
20 the duplication on tape. I just came back from Paris
21 where this was discussed, constantly discussed.
22 No society or performing rights organization or
23 collecting society has been able to come up with
24 an answer to this. They don't know.

25 Now, the German society has what they

1
2 consider to be a solution which even they will
3 recognize, only privately, however, and not publicly,
4 is really not a solution, they tax the machine.
5 I don't believe that they tax the tape, although
6 that would be the best way, but they tax the machine.

7 However, so far no one has been able to
8 come up with an answer to this, so again coming
9 back to what I said, I just think you are going to
10 have to make an arbitrary decision somewhere along
11 the line.

12 MR. CARY: Mr. Cramer, did I understand
13 you to say that you do not include the bars and
14 grills and the small things in your sampling of
15 any sort?

16 MR. CRAMER: We only sample broadcasting.

17 MR. CARY: Do you license the bars and
18 so forth?

19 MR. CRAMER: Yes, we have 23,000.

20 MR. CARY: And how do you arrive at the
21 amount that you charge them?

22 MR. CRAMER: Well, it depends upon the
23 kind of licensed establishment. If it is a hotel
24 we sit down in a room with representatives of the
25 hotel association and you fight about a fee, and

1
2 they say it is too high and you say it is too low
3 and you try to come up with some kind of a fee that
4 we think is related to their entertainment budget.

5 With bars it is very difficult. We have
6 to try to figure a fee that we think the traffic
7 will bear. For example, what is a fee for a small
8 establishment that uses a piano on the weekends?
9 \$75 a year, and we thought that that would not be
10 a wholly unreasonable fee.

11 We had nobody who negotiated with us at
12 the outset, so that is where we upped it to.

13 MR. CARY: In other words, you try to fix a fee
14 that does not prevent you from getting out of the bar;
15 is that it?

16 MR. CRAMER: Yes, that is about right.
17 That is the area that is the most difficult one.

18 MR. LACY: Well, do you represent
19 affiliates who are seeking to recover income that
20 will be available from jukebox licenses and from
21 cable television?

22 MR. CRAMER: Yes, very vigorously and
23 underscore that.

24 JUDGE FULD: Does either of your associates
25 want to add anything?

1
2 MR. CRAMER: I have just one comment that
3 is not related to this, if I may. Stick it somewhere
4 maybe for future consideration.

5 JUDGE FULD: Yes?

6 MR. CRAMER: It has nothing to do with this,
7 but we had a question posed to us sometime ago which
8 was fascinating.

9 Apparently in Finland tangoes are big. I
10 don't know why, but they are. We got an inquiry that
11 said a computer specialist took fifteen popular
12 tangos and determined what the best features of
13 those tangos were, and by putting them into the
14 computer, he came up with new tangos based upon
15 the work of those fifteen other ones, and the question
16 that was posed to us was, "Who do we pay?"

17 I haven't the foggiest idea of who to pay,
18 so as long as I have the Commission here and you have
19 asked me questions, would you please tell me who do
20 I pay for the performance of the tango? I don't know.

21 MR. PERLE: Don't ask John Hersey that
22 question.

23 JUDGE FULD: I will give you the answer
24 in 1979.

25 MR. CRAMER: Pardon me?

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1
2 JUDGE FULD: I will give you the answer in
3 1979.

4 MR. CRAMER: One other serious thing. That
5 was a question really posed to us, and no kidding
6 aside.

7 Another thing that is of concern, I think,
8 is that the problem of reproducing musical scores
9 is a lot different from reproducing material other-
10 wise in libraries and that represents an entirely
11 different area. When you have multiple copies, you
12 have your problems.

13 MR. DIX: One more question: On the juke-
14 box thing, would that be on the basis of the place,
15 the bar and grill, or on the basis of the machine,
16 or what is the method where you go about taxing them?

17 MR. CRAMER: I wish I knew the answer to
18 that, because under the new copyright law the money
19 will go into a fund. They will pay \$8 a box.

20 That fund will then be distributed by the new
21 Copyright Royalty Tribunal which will have to make
22 that determination, first deciding how much will
23 go to those writers and publishers not affiliated
24 with any of the performing rights organizations,
25 such as ASCAP, BMI or SESAC, and that is the

1
2 tribunal's determination as to how they are going
3 to distribute the balance of this pot, and I really
4 don't know how they are going to do it because the
5 annual payment per box is only \$8.

6 Now, the cost of trying to sample this
7 thing is going to be staggering. There won't be
8 any money left.

9 I just don't know the answer to that. That
10 is for the Tribunal. It is our joint headache, and
11 the Copyright Office maybe.

12 JUDGE FULD: Thank you very much, sir.

13 Before the Commission embarks on a discussion
14 of the subjects we have heard today, I would like to
15 mention that our agenda for tomorrow, a copy of which
16 was circulated sometime ago, has been modified.

17 At tomorrow's session, we are not going
18 to discuss the drafts of the Commission's reports
19 dealing with computer software or data bases as
20 previously indicated. More specifically, we have
21 put off to our next meeting consideration of those
22 reports.

23 The reason, briefly stated, is that we
24 are awaiting further memoranda on software and
25 data bases.

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2 Instead, as your agenda circulated this
3 morning indicates, we shall hear from Mr. Ed Brown,
4 concerning the problems of newsletter publishers
5 and the photocopying of their products, and our
6 second speaker will be Mr. Allen Ferguson, who will
7 address us on the analysis of computer and photocopying
8 copyright use from the point of view of the general
9 public and the ultimate consumer.

10 VICE CHAIRMAN NIMMER: May I ask what
11 time you estimate we will adjourn tomorrow?

12 JUDGE FULD: It will be sometime around
13 12:00 or 1:00.

14 At this point, we will adjourn until 9:30
15 tomorrow morning.

16
17 (Whereupon, at 4:05 P.M., an
18 adjournment was taken until Friday,
19 April 1, 1977 at 9:30 A.M.)

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STATEMENT BY
EDWARD M. CRAMER, PRESIDENT, BROADCAST MUSIC, INC.
TO THE NATIONAL COMMISSION
ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

STATEMENT BY EDWARD M. CRAMER TO THE NATIONAL COMMISSION
ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

March 31, 1977

The most amazing story in the vivid history of American Music is that of the growth of BMI during a period of some three dozen years. Starting with little more than the determination to provide competition and opportunity, BMI today represents the largest group of composers, writers and music publishers in the world. In this growth BMI has been abetted by a number of factors--technological, social, political and economic--which have changed the scope and character of popular music around the world.

A far different music world than the one we know today existed in the late summer of 1939 when plans were unveiled for a new music licensing body to be known as Broadcast Music, Inc. At the time, three companies dominated the recording industry. They provided virtually all records bought by the public, used by those of the 700 existing radio stations that chose to broadcast recorded music, and by the 400,000 machines of the burgeoning jukebox industry.

Fewer than 150 music publishers and slightly more than 1,000 songwriters shared in an annual performing rights income of about

\$6,000,000. Most of that money was distributed only on the basis of live performance during evening hours on the country's four radio networks. Recorded performances did not count, nor did those on independent radio stations.

There were thousands of composers and music publishers who could not share in this source of revenue. It was impractical for these individuals to negotiate performing rights licenses with the thousands of establishments that utilized music commercially. Forms of music that are widely popular today were generally unknown, except to small and isolated audiences. Country music was referred to as "hillbilly," rhythm and blues as "race." These and other manifestations of the great American musical genius were frustrated by the lack of economic encouragement and cultural acceptance.

Such a state of affairs could be resolved only by the creation and development of meaningful competition and economic opportunity, and by government intervention, which would lead to the democratization of American music whose fruits the world enjoys today.

In 1940, some 600 enterprises, principally engaged in broadcasting initiated this change by forming BMI. The organization filed documents

with the Securities and Exchange Commission, declaring that no dividends were ever expected to be paid on an original investment which averaged some \$500. None has. Nor has BMI ever operated as a profit-making body.

By achieving the classical feature of competition--a free and unrestricted market for intellectual property--BMI opened its doors to all creators of music, including those who had previously been denied an opportunity to share in performing rights income. It adopted a method of compensating these writers and publishers which would equitably credit them with actual performances--whether live or recorded, whether national, regional or local. It offered non-discriminatory licenses to all users. Most significantly, it served the public by encouraging every kind of music.

The significance of the operating philosophy which BMI has maintained since its inception--an opportunity to be paid for actual and representative performances--can best be illustrated by a short digression. Some early history of the publishing firm of Acuff-Rose of Nashville will serve to underline the role BMI has played in the democratization of American music.

Fred Rose was a songwriter who began writing in those days around World War I when the vaudeville performer was the principal medium for bringing American popular music to American audiences. Mr. Rose learned his craft writing for these stage and theater personalities. Many of the songs he created for them became outstanding hits.

During the 1930s he was in Hollywood. He wasn't writing music for musicals produced by the major studios, but for Gene Autry westerns. Songs from these movies never received significant radio network performance, and consequently never attained the Hit Parade status that only such performances guaranteed. However, Fred Rose had recognized that a considerable portion of Americans preferred the Gene Autry movie to the musical spectacle, the music written for those westerns to the outpourings from Broadway and Hollywood.

In 1942, at the urging of Roy Acuff, the star of Nashville's Grand Ole Op'ry, he decided to become a music publisher. As a loyal writer member of ASCAP he first went to his own organization and offered to bring to it the sort of cowboy songs he had been writing-- as well as the country music of Nashville where he now made his

home. He was rejected. The music he wished to represent and to further was not the sort of music programmed on the 1940s radio networks. It was not the sort of music that the ASCAP system of payment rewarded.

Fortunately, Fred Rose had another place to go. He came to BMI and outlined his ideas, and BMI grubstaked him in the traditional way that opened the American frontier for more than a century. We advanced him and his partner Roy Acuff a small sum against our mutual expectations of eventual success.

The rest is history, but it is a fantastic history, one that saw the creation and development of one of the most successful music publishing ventures of the past 35 years. Fred Rose had seen a new future for American music. He believed in that vision. His faith and his judgement were rewarded beyond the wildest expectations either he or BMI had in the mid-summer of 1942.

The Acuff-Rose story is unique only in the dimensions of its ultimate success. It is a story that has been duplicated within the BMI family without end.

Because of its open door policy, because it offered fair rewards

for the use of copyrighted music, BMI was able to pioneer in the encouragement and development of the music that has gained the greatest international popularity in history. The first and most significant creators of Country music, rhythm and blues, rock'n'roll and other manifestations of contemporary music licensed their works through BMI. As a result both the BMI repertoire and its affiliated writers and publishers were able to grow in a manner without precedent.

At the start of this year over 16,000 publishers licensed their music through BMI, an increase annually of about 1,000 new affiliates. As of January 1, 1977, 31,000 writers were affiliated with BMI, and their numbers grow annually at an average of 2,500.

BMI's income has grown commensurately with this growth of affiliates and repertoire. More than 7,000 radio stations, 700 television broadcasters and more than 21,000 general licensees paid \$55 million last year. Eighty percent of this came from broadcast users, about 8% from general users, the balance from foreign and other sources. Although BMI offers several types of licenses, 99% of our music users prefer the blanket form of contract, which gives them unlimited access to music in our repertoire. BMI treats

equally all licensees similarly situated.

This is one of the principal themes contained in a consent decree in a Federal antitrust action to which BMI was a party. In broad outline such decree sets forth certain practices and procedures for BMI to follow in such areas as the terms of contracts for writers and publishers and for users of music. The Court retained jurisdiction on a continuing basis in connection with the decree.

MODERN DATA PROCESSING

Both BMI's collection and distribution systems are fully computerized. Indeed, since its start BMI's performing rights royalty distribution has used the most modern data processing technology. In 1964 BMI pioneered the international exchange of royalty accountings in machine-readable form.

Since 1973, the BMI repertory of over 850,000 licensed works, together with the names of the writers and publishers involved, has been maintained in an electronically accessible data base. New works registered with BMI at the rate of over 40,000 a year are added to this repertoire directly by means of cathode ray tubes, CRTs, or screens, connected to a main data base. Information updating, for

example the new address of an affiliated composer or that of a major promoter in the field of popular concerts, is also handled by these CRTs. At this writing BMI employs 28 CRTs to accrete and maintain all information. Two of these screens are located outside the New York headquarters office, with more to be placed in other locations. The world-wide growth of the music business has made use of computer technology an absolute necessity.

We are currently completing a year-long project to provide improved computer technology to meet our future needs. On July 1, 1977, installation of an IBM 370/148 system will more than triple our on-line storage capacity. This system will allow BMI to install CRTs in other offices, such as Nashville and Los Angeles; as well as, provide on-line capabilities to other departments in the company.

The technology provides the best service to affiliated writers and publishers, to BMI's sister licensing bodies, the users of music and the general public in search of accurate information.

BMI's collection work is handled by a billing system whose accounts receivable ledger consists of some 30,000 accounts, all maintained on the computer. About one-quarter of these licensees receive monthly bills, while some 14,000 are issued computer-prepared bills once each calendar quarter. The remainder are subject

to semi-annual and annual billings.

The licensing of music users, both broadcast and general, is the responsibility of a field staff of over 50 representatives working out of six regional offices which cover all of the U.S. The users with whom they deal include radio and television stations, hotels and motels, restaurants, nightclubs, cocktail lounges and taverns, discotheques, ballrooms, skating rinks, background music services, airline inflight music, theme parks, symphony orchestras, concert halls and promoters, sports arenas, trade shows, traveling attractions like ice shows, circuses and rodeos. All of the many kinds of attractions of which music forms a commercial feature are dealt with. These music users are mailed the proper license forms for completion and return. Field representatives are always available for information and assistance that may be necessary.

BROADCAST CUSTOMERS

In addition to stations already on the air, licenses are issued to all new stations and are issued anew each time a station changes hands. Annually, BMI licenses 500 stations which change ownership, and provides information and assistance to those others of the 7,700

licensed by the FCC.

The fees and terms of broadcast licensing agreements are not set arbitrarily by BMI. They are the result of periodic negotiation between BMI officials and the All-Industry TV Stations Music Licensing Committee and the All-Industry Radio Stations Music Licensing Committee. These committees consist of owners and/or executive personnel of radio and TV stations from coast to coast. Fees are based on station income, less certain applicable deductions.

GENERAL LICENSES

General licenses are established as the result of negotiations with established trade associations, organizations or other groups covering specific situations.

Because of the wide variety of music users and situations, there can be no single way of calculating fees for these blanket licenses. They must be carefully tailored to specific circumstances and in assessing fees BMI uses the most appropriate yardstick of payment for each type of music user.

For instance, hotel, motel and cafe fees are based upon the annual expenditures for musicians and entertainers. Other fees will

be based upon the seating capacity of the concert hall, or the percentage of gross annual income, as in the case of ballrooms.

The BMI fee structure is carefully shaped to accommodate all factors within the situation, assuring equal treatment for all users of the same type.

ENFORCEMENT PROCEDURES

BMI believes that it has a responsibility not only to its affiliated writers and publishers but to its sister foreign licensing bodies to insure that the copyrighted music it represents is properly licensed for use by music users. We also have an obligation to these licensees who have discharged their responsibility to comply with the provisions of the copyright law. Consequently, BMI field representatives, among their other duties, regularly check music-using establishments to determine whether the performing material we represent is properly licensed. Where this is not the fact, the user is promptly mailed the necessary license forms for completion and return, together with an explanation of his responsibility and catalogues of our music. When required, legal action is pursued under provision of the federal law. During the past year we have

instituted over 275 actions against various users, including broadcasting stations, discotheques, nightclubs, motels, restaurants and others.

CLEARANCE AND PAYMENT SYSTEM

BMI pays out the great bulk of the money that it receives to the creators and copyright owners of the music it licenses. It does not pay dividends and it is not a profit-making organization. All income is distributed except operating expenses and a small general reserve. Except for a modest handling charge, all foreign monies are distributed to writers and publishers.

This year BMI will send approximately 65,000 payment statements to writer and publisher affiliates. Because our domestic payment distribution cycles are quarterly, some affiliates will receive as many as four statements. Others who have had no works performed will receive none. BMI, as you may know, has traditionally maintained an open door. Any writer or publisher may affiliate with us providing they are not already affiliated with some other U.S. performing rights organization; providing they do not engage in songsharking--the acceptance of money for the publication of music--and providing

they have music which is susceptible of performance.

In principle, the BMI distribution process is a very simple one. Two sources of input are required. The first has to do with our being informed about a title since we obviously can't track performances on a title about which we know nothing. The second has to do with the actual logging of performances.

The procedure whereby affiliates notify us of a title's existence is something we call Title Clearance. Samples of these clearance forms are included as exhibits in your copy of this statement.

(EXHIBIT 1) Slightly different forms are used to differentiate between writer and publisher clearances and popular or concert works. You will note that the clearance form provides us with basic material needed to operate our system--Title, Writer, and Publisher information, and, most important, the manner in which payments are to be shared. When there is more than one writer participant, for example, it's entirely possible that the shares are not equally split. These Clearance Forms, incidentally, also indemnify us from disputes between publishers and/or writers over these claimed rights.

Once a clearance form is received--and about 1,000 come in to

us weekly--the information is reviewed to see if any immediate problems are evident such as identical or very similar material already in our data bank. If no problems are evident, the new material is added to our computer files via CRT terminals. If there is an apparent conflict, the clearance form is returned to the sender with a request that the form be changed to avoid future confusion. Original clearance forms are regularly microfilmed for easy storage retrieval.

The process does not end when the initial clearance has been entered. Writer shares frequently change, publishers often buy or sell anything from an individual title on up to an entire catalogue and legal disputes between participants--writers and/or publishers--frequently erupt.

As a very simple case-in-point, you have attached to the written presentation, a photocopy of the now microfilmed original clearance we received for the song "The Rubberband Man." (EXHIBIT 2) There is also a photograph--taken from one of our computer terminal video screens--of that data as it presently appears in our data base available for immediate informational retrieval. (EXHIBIT 3) The

two are no longer identical. When the title was originally cleared, all publishing rights belonged to a company called Mighty Three. Subsequent to that, Mighty Three entered into a sub-publishing arrangement with Blackwood for all Canadian performances of "The Rubberband Man." We were informed of this new agreement earlier this year, validated it, and made the necessary change to our data base.

Incidentally, you'll notice some other fields toward the lower right in that scope photograph which carry the legend "N/WH." This means that payment for performances of this title is not to be withheld. If a legal dispute were pending over rights to this title--and we had been so informed by any of the participants in that suit-- payment would be withheld until the suit had been resolved and that field, in the interim, would show as "Y/WH" meaning "yes, withhold."

A few minutes ago I mentioned that our distribution process requires two essential sources of input. Once the title information has been added to our data base, the next major step in the payment process is a determination of performances. It's a practical impossibility for us to determine what music each of our more than 30,000

licensees is performing at all times. The alternative is to sample.

Starting with the assumption that there are two major musical performance universes--broadcast and non-broadcast--both of which are essentially similar, we have chosen to confine our sampling to the broadcast media only. We recognized that some problems were inherent in this decision, but our statisticians--and they rank as some of the nation's most outstanding ones--felt that the additional refinement to be gained by sampling both universes was far outweighed by practical consideration. The sampling process is confined to local radio and television stations. The television networks regularly provide us with logs of all of their programs, giving us a complete census of the music they have performed. Motion picture and syndicated program producers provide cue sheets which are kept on file and used when a particular film or program plays either on the networks or local television. We also have an arrangement whereby material similar to that used by TV Guide is made available to us. When this is combined with cue sheets already on file, we are provided with material for a census of the vast majority of local TV performances.

In the field of concert music, BMI secures programs of symphony orchestras, concert and recital halls, etc., to ascertain actual performances of works by BMI composers.

Even with these exclusions, however, our sampling is far from a minor operation. Essentially a stratified random selection, our sample--after factoring--yields nearly 200 million BMI performances a year on U.S. AM and FM radio alone.

Each sample stratum--and there are more than a score of them--is based on a variety of elements including a station's air hours, the amount of music it normally plays and its geographic location. Stations with similar characteristics are grouped in individual stratum.

Our licensing agreement with each station requires that it log--and provide us information--on all music performed for one week per year at our request. Our experience has been that this diary form of logging is far more accurate than our trying to monitor stations and determine--by ear--what titles are being performed. It also provides us with a great many more regional sample points than would otherwise be practical to analyze. This logging concept is the key

to our ability to accurately reflect regional differences in musical performance. Instituted from almost the very beginning of BMI, it significantly distinguishes us from procedures used by other U.S. performing rights organizations.

No one at BMI knows, in advance, the identity of stations being logged. Each week a pre-determined number of stations is selected randomly from within each stratum by a firm of outside independent auditors. This same firm then contacts the station and provides them with the necessary logging forms. Not until the forms actually arrive for tabulation do we know the identity of the stations involved. A page from one of these station logs is included among the exhibits given you. (EXHIBIT 4)

There is a good deal of variation in the way music is reported by individual stations being logged. "The Rubberband Man," for example, might also be called the "Rubbing Band Song." For some titles, the number of variations staggers the imagination. Each log, as it is received by our Logging Department is entered into the computer in precisely the form received. No attempt is made at that time to correct misspellings or determine what title was actually meant or,

in fact, to distinguish between BMI and non-BMI music.

After all log information has been entered, an alphabetical listing of these entries is produced. If an entry provides an exact match to title information already in our data bank then the computer will also print the appropriate song identification number alongside of that title in this alphabetical listing. This number is a permanent unique identification assigned to a BMI title after its first logged performance. Logging Department personnel then review these listings to identify all non-matched titles. Non-BMI titles are blue-lined. Title variations, when seen grouped together in these listings-- and samples of these have been included in the material given you-- generally form an easily identified pattern. In those few instances where a particular variant is not readily identifiable, additional research is done. (EXHIBIT 5)

Finally, after every title has been identified--and the correct song identification number written in alongside of it--the material is sent back for re-input to the system. These sampled--and identified performances--are now multiplied by the weighting factors developed for the particular stratum from which each performance was obtained.

The weighted sample performance totals are then merged with other totals derived from network and TV Guide census figures and the final totals provide the basis upon which we make our payment distribution.

It is somewhat difficult to say just how much the operation-- up to the point I've now discussed--actually costs. In the fiscal year ended June 30, 1976, our data processing costs were approximately \$1,100,000, but our logging and clearance represented far less than 100% of that activity. The Logging and Clearance Department budget for that same period--excluding Data Processing and allocating overhead--was slightly under \$470,000. The local station sampling, a function performed for us by an outside auditing concern, cost approximately \$55,000.

On the surface, distribution of royalty revenue, would appear to be the easiest part of our operation. And, from the standpoint of an affiliate who sees only a quarterly statement, it is quite simple. A statement lists each title performed in the distribution quarter, the type and number of performances each title had enjoyed, and the payment being made. Our payment schedule is a very precise one and easily understood. We are now preparing a new schedule which

will be ready shortly. The changes being incorporated are not of form but of detail. BMI will be pleased to send you this material directly upon completion. I must point out, however, that the sums indicated in this new form--as those in the past--indicate only the minimum payment.

We operate as a non-profit making organization and all distributable revenue is paid out on a quarterly basis. In recent years, the amount of money available for distribution has exceeded the amount to be paid based on minimum rates calculations. We have, therefore, in each of those quarters voluntarily increased payments made to some class or classes of performance. In our most recent payment quarter, this increase amounted to an additional 25%.

One of the most significant changes that will be incorporated within our new payment schedule is a bonusing plan keyed to cumulative performances. Effective July 1, 1977, when the cumulative feature performances of a title reach a certain plateau--say 25,000--all subsequent performances of that title will be paid at a higher rate--perhaps one and a half times the base rate. At another plateau level, the payment will go still higher and so on through an ascending

series of performance plateaus.

As you've undoubtedly realized by now, the distribution function within our operation is not as simple as it appears from the end product. A considerable number of payment classifications must be taken into account depending on the type of usage such as feature, background, theme and the time of day and type of program on which a certain performance took place. We also have station groupings--AM, FM, TV, local and network and, within these groupings, sub-groupings determined by the income level of a station--and the payment schedule varies for each station classification. After all of these elements have been factored into the payment computations--plus the new feature performance bonus becoming effective this July--additional items must also be considered before a check is actually issued. There are two writers involved in "The Rubberband Man," for example, and, in this instance, they are each to receive 50% of the writer's share of royalty payments. It's entirely possible, though, that there will be more than two participants or that the shares will not be equal. And when you explode the possibilities across more than 47,000 writer and publisher affiliates and over 850,000 titles, you

can begin to appreciate the extent of current material in our data banks and the sophisticated level of programming and personnel we've developed to use and maintain it.

FOREIGN DISTRIBUTION

Everything I've said thus far about our system can be applied to both U.S. and foreign payments. There are some additional aspects to the foreign side of our operation, however, that deserve mention at this time. As already stated, we have reciprocal agreements with 38 foreign performing rights organizations throughout the world. An international, centrally maintained, data bank exists in Zurich called the C A E file, which, translated, means literally the writer and publisher file. This contains the names of writers and publishers and the performing rights organization to which they belong. By international agreement, performing rights organizations have the responsibility for notifying each other, and the maintainers of this central C A E file when changes occur. Once performance monies have been collected, and the rights to that title properly identified in terms of writer and publisher, payment can then be directed-- using, among others, the C A E file--through the proper licensing organization.

The C A E file, however, is only one of several reference points in the foreign distribution process since it contains no information regarding bilateral agreements between publishers and/or writers either internationally or domestically. In general, when a U.S. publisher grants sub-publication rights to a foreign publisher--or publishers--the recipients of these new rights inform their own licensing organization. Since that is the only route through which they can get paid, the motivation is an obvious one. If a U.S./BMI publisher, for example, granted sub-publishing rights to a French firm, that firm would then notify SACEM (the French Society) who would, in turn, notify us of the new agreement and the agreed upon share structure for payment. We would then check our files to see if the U.S. publisher had already notified us of this arrangement and, if not, contact him to confirm it. Once confirmed, we add the information to our own data base so that we can properly distribute any incoming foreign performance monies that may be earned. We deduct 5% of these foreign incoming monies for handling charges.

A similar, though converse, process takes place when a foreign publisher grants sub-publication rights to a U.S./ BMI firm. In

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either case, if the confirmation procedure reveals that the sub-publication rights are in dispute, the parent licensing organization is notified and international payments for the disputed title or titles are withheld until the problem is satisfactorily resolved.

BMI'S SERVICE TO MUSIC

From the beginning BMI has brought new concepts into music licensing. It welcomes new writers and publishers. It treats all music users as customers entitled to fair treatment. It is concerned about the public and strives to deserve its good will.

On the occasion of BMI's 20th anniversary the distinguished publication Musical America hailed BMI's contribution, saying:

"Broadcast Music is a business with a conscience, fully aware of the pressing need to make dollars work for contemporary composers and music....In a scant 20 years since its founding BMI has taken a mature and responsible stand on the state of contemporary, and most important, American musical thought. It has realized that only through realistic support of our writers, through money, performance and recordings can the composer of today find an opportunity to flourish and work for America's culture and stature

in the world of art."

That concern does not sit lightly on our shoulders.

Thus far I've given you a fairly general picture of BMI--our history, the scope of our organization and the procedures that distinguish our operation. At this point, I'd like to begin narrowing my focus by answering specific questions that any of you might have.

APRIL 1, 1977

9:30 A.M.

JUDGE FULD: May I call this morning's session to order.

Our first speaker is Mr. Ed Brown, President of the Newsletter Association of America. He is also President of Atcom which publishes a number of newsletters and two scholarly journals.

Prior to his association with Atcom in 1963, Mr. Brown was a free lance reporter for several trade publications in the automotive field and an account executive for the Hearst Advertising Service.

He will address us on the problems confronting newsletter publishers when photocopying occurs unchecked.

Thank you for being here, Mr. Brown.

STATEMENT BY

MR. ED BROWN

PRESIDENT

NEWSLETTER ASSOCIATION

OF AMERICA

MR. BROWN: Thank you, Judge Fuld. Thank you, ladies and gentlemen for allowing us to be here today.

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2 As the Judge has told you, my name is Ed
3 Brown and I am President of the Newsletter Association
4 of America.

5 I might add that we are really a neophyte
6 group. We have only been together about three months
7 and we are coming now to many of the problems in the
8 industry, and this is a new venture for us, something
9 that we have never actually spent very much time think-
10 ing about, so some of the things I say may seem a
11 bit naive.

12 I am the publisher of eight newsletters in
13 a variety of business fields, from automotive to funeral
14 service. I very much appreciate the opportunity to
15 appear here this morning.

16 I am here to speak for newsletters which
17 are true journalistic enterprises. The Association
18 does not currently represent house organs, publicity
19 devices or the like. Most of our members produce
20 publications which are published for profit and
21 supported chiefly by subscription, (rarely by adver-
22 tising) and are owned and operated independently of
23 any industry, business, association or institution.

24 In actual fact, we believe we are news-
25 papers in miniature. Most of our members publish

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2 at frequent intervals, some as often as daily, a
3 vast number weekly, others bi-weekly, and still
4 others monthly. The main purpose, and the bread and
5 butter of virtually every newsletter is the collec-
6 tion and dissemination of news of general interest
7 and reports of current events, within the field of
8 its purview. I would carry this one step further and
9 say that newsletters delve deeply into issues of
10 consequence to readers and will generally offer
11 interpretations of news affecting business and
12 personal lives no different perhaps than an editorial
13 in a newspaper, but available to its readers in no
14 other media.

15 The depth of perception and the ability
16 to offer accurate analyses and forecasts within its
17 selected area of expertise is, we think, what makes
18 a newsletter important to its reader, perhaps above
19 all other reading the subscriber may do.

20 The effectiveness and the appeal to the
21 public of the newsletter concept is obvious from the
22 fact that virtually every magazine today is insert-
23 ing a newsletter page or two just prior to publica-
24 tion in order to bring late breaking news to its
25 reading public. They have found this to have

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2 exceptionally high readership value. Thus, they have
3 acceded to the timeliness and current value of
4 newsletters.

5 The newsletter industry is uniquely
6 vulnerable to violation of copyright for the follow-
7 ing reasons:

8 1. The typical newsletter is very brief --
9 comprising a few pages, often no more than 4 -- and
10 is therefore susceptible to quick photocopying in
11 its entirety.

12 2. Since newsletters' income almost always
13 comes from subscriptions alone, illegal reproduction
14 and distribution have an immediate and often devastat-
15 ing impact on the market for the publication, thus
16 the total viability of the publisher.

17 3. Newsletter publishing is small business
18 in its very truest sense. With very few exceptions,
19 each of the thousands of newsletters published in the
20 United States is the product of a few journalists --
21 frequently only one -- often assisted only by their
22 families.

23 A recent survey of the newsletter industry,
24 conducted by Shirley Alexander when she was chair-
25 person of the organization which preceded NAA's

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2 existence, shows that 19 percent of newsletters have
3 500 or fewer subscribers; 21.5 percent have 501 to
4 1,000; 21.5 percent 1,001 to 2,000; 28 percent 2,001
5 to 5,000; 10 percent more than 5,000. With the
6 average subscription running about \$50 yearly, it is
7 starkly evident that the revenues of a typical news-
8 letter constitute small business indeed.

9 Simple arithmetic demonstrates dramatically
10 the drastic impact that even a limited amount of
11 copying may have on the viability of a newsletter.
12 A newsletter with 500 subscribers, charging \$50
13 a year, has a gross revenue of \$25,000. If illegal
14 copying deprives the publisher of a mere 100
15 subscribers, he suffers a loss of \$5,000 -- or 20
16 percent of his income.

17 Some newsletters are written for very highly
18 circumscribed audiences. Granted, they are high priced
19 newsletters, but the economics of the market demands
20 that, since their total subscriber list may be
21 slightly over 100 or even below that number. A
22 New York newsletter publisher told me last week that
23 copyright protection is exceedingly important to
24 him because if he lost only 10 percent of his market
25 through photocopying, he would be forced to close

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2 down. Still, he is penetrating his market by an
3 almost incredible 90 percent of its potential, so he
4 has proven how important his material is. But a
5 10 percent fluctuation could do him irreparable
6 harm.

7 I don't cite the above publisher as a horror
8 story. It is more typical than the profession would
9 like it to be, although it is one of the hazards
10 we are willing to deal with, so long as we are
11 protected on a copyright basis.

12 The Newsletter profession is a new industry.
13 Recently a survey of publishers in New York State was
14 conducted for a different purpose. But the few
15 statistics I would like to relate here, are perhaps
16 quite relevant to the situation.

17 There are some 250 newsletter publishers in
18 New York State. They have an estimated annual gross
19 of \$289 million. They employ about 3,500 people
20 and have a total payroll of \$79,500,000 annually.
21 That may seem contradictory with the fact that we
22 mentioned earlier that this is a small business.
23 But in fact, in the aggregate, that's not a tremendous
24 amount of money, although it is important to relate
25 this to the jobs, and the protection of those jobs, as

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2 well as the contribution this profession does make
3 to the entire economy.

4 Our contribution is only sustainable if we
5 have copyright protection.

6 As you can see from the figures we've used
7 here, Newsletter publishers simply do not have the
8 economic strength to police and litigate violations
9 of their copyrights. Indeed, many publishers have
10 not even filed their newsletters with the Register
11 of Copyrights, believing that the cost of \$300 a
12 year per newsletter isn't justified by the insignifi-
13 cant amount of protection provided until now.

14 We do recognize that no Act of Congress can
15 provide complete and automatic freedom from jeopardy.

16 We do believe that the intent of Congress
17 in providing for "fair use" is eminently laudable.
18 Our concern is that newsletters are peculiarly
19 vulnerable to abuses of "fair use." The reproduc-
20 tion of even a single page of a newsletter -- or
21 frequent reproduction of even mere sentences or
22 paragraphs on specific topics -- can often provide
23 a businessman with all he needs without cost, thus
24 eliminating him as a source of revenue. In fact,
25 many newsletters conduct surveys and analyses which

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2 result in a single critical number. The illegal
3 copying of this single number can deprive the
4 publisher of major revenues. For example, one of
5 my publications has recently concluded a survey
6 on the thinking within the soft drink industry of
7 the controversial returnable bottle. Theft of certain
8 segments of this survey, when reproduced ^{from that}
9 newsletter, would vitiate the entire enterprise.

10 We recommend therefore:

11 1. Exclusion of newsletters from any
12 "fair use" reproduction. However, since most of
13 our subscribers are businessmen -- and we have no
14 desire to exclude students from access to our
15 material -- we believe that not-for-profit libraries
16 should be allowed "fair use." We believe that
17 corporate and other business operated libraries
18 should be excluded.

19 2. Should no "fair use" exclusion be made
20 for newsletters we urge that copying of any portion
21 of a newsletter be allowed only upon written permis-
22 sion of the publisher. Historically, most newsletter
23 publishers are pleased to authorize such reproduction
24 on an occasional basis.

25 3. If neither of the foregoing is warranted,

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2 we urge, at a minimum, that such language as the
3 following be included in referring to "fair use:"
4 "For Newsletters, fair use shall include reproduction
5 of 50 percent of any article or 150 words, whichever
6 is less. Each tabulation or graph shall be con-
7 sidered a separate article. Persons reproducing
8 portions of a newsletter, should furnish the
9 publisher with copies of such reproductions. On
10 request of the publisher, such person shall provide
11 him with the names, affiliations, and addresses of
12 the persons to whom such copies were distributed."

13 We suggest this is at least the very
14 minimum protection we should have under this new law.

15 The influence of newsletters on policy makers
16 in government and industry is substantial and is
17 increasing. Therefore, the temptation to use our
18 material in ways which are harmful to our marketing
19 positions increases also.

20 We have heard some of the suggestions for
21 the establishment of a kind of clearing house for
22 technical, scientific and medical journals. After
23 having heard in brief outline what this constitutes,
24 and following some discussions I have held with some
25 of the individuals involved in these suggestions, I

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2 feel certain that if newsletter publishers were
3 invited to join in this undertaking, many would
4 avail themselves of this opportunity. It is a new
5 idea which honestly, we haven't had much time to examine
6 yet, but I feel certain many would welcome it.

7 We sincerely appreciate this opportunity
8 to appear before you and present our case. If there
9 is any other way in which we may offer assistance
10 to you in your work and deliberations, we will make
11 every effort to do so.

12 Thank you again for this opportunity.

13 JUDGE FULD: Thank you for being here.

14 Do you have any way of checking how many
15 newsletters have been photocopied?

16 MR. BROWN: No. Since the industry is
17 new, the association is new, we honestly don't even
18 know how many newsletters there are in the field,
19 but I think every newsletter publisher just has
20 to assume, and in our discussions among ourselves
21 when we have talked about copyrighting in the past,
22 everyone has assumed that at one time or another
23 their newsletter does get copied. Some people think
24 it is fairly substantial. Other people think it is
25 not too substantial.

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2 JUDGE FULD: Mr. Nimmer.

3 VICE CHAIRMAN NIMMER: Mr. Brown, with
4 respect to the possibility of a clearing house system
5 where a uniform price is charged without differentia-
6 tion as to the particular publisher and the price that
7 the particular publisher may ask, which is one group
8 but not necessarily the only group, but assuming such
9 a uniform price I can understand the argument that
10 what might be a fair uniform price for certain journals
11 would not be fair for newsletters because of the lower
12 circulation and the various factors you have mentioned,
13 but then that poses a problem of drafting legislation.

14 How would one define a newsletter or other
15 type of publication that should fall within a category
16 of newsletters wherein a higher per page or per article
17 price for reproduction would be justified on a clear-
18 ing house basis as compared with other types of works?

19 Have you any suggestions as to how one might
20 define it?

21 MR. BROWN: I have to admit, Professor
22 Nimmer, that I do not know.

23 I think it is a fair question. Will there
24 be an opportunity for us to present an answer to that
25 a little bit later on after we have had a chance to

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2 discuss it with other newsletter publishers? I think
3 it is a good question and one that we should answer
4 for you.

5 At the moment I can only say that we are
6 having difficulty defining a newsletter. Some news-
7 letters carry advertising, some people who call them-
8 selves newsletter publishers are in fact putting out
9 tabloid type newspapers and yet they are calling
10 themselves newsletters, so we are having a problem
11 and I think we should try and come up with an answer
12 for you, but I can't at this moment.

13 VICE CHAIRMAN NIMMER: Thank you.

14 JUDGE FULD: Dr. Dix.

15 MR. DIX: Mr. Brown, do you have any idea
16 how many of your subscribers for your own news-
17 letters are not-for-profit libraries, university
18 libraries and public libraries?

19 MR. BROWN: It will depend, Doctor, upon
20 the type of newsletter.

21 Seven of my newsletters go to smaller
22 entrepreneurs. The eighth one is a newsletter
23 called "Behavior Today," which goes to the behavioral
24 profession.

25 I would say that a good 70 to 75 percent

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2 of that newsletter goes to libraries.

3 MR. DIX: The reason I ask is I would
4 suggest there is not much inter-library traffic
5 in newsletters, simply because they exist in part
6 because of their particular content for a specialized readership.
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11 I am also wondering whether the greatest
12 abuse doesn't come by the in-house copying in various
13 establishments that want to make extra copies of
14 certain newsletters.

15 MR. BROWN: I would say that the abuse by business
16 represents 90 percent of that felt by newsletters.

17 MR. PEYTON: Mr. Brown, have you considered
18 the possibility of two-part pricing, to have a higher
19 price which would allow the subscriber to copy all
20 he wants?

21 MR. BROWN: It has been discussed by some
22 newsletters. No one has ever put into effect a two-
23 price system that I know of in the newsletter field.
24 It may be, but I don't know of it.

25 JUDGE FULD: Any other questions?

Mr. Frase.

MR. FRASE: This New York State survey you mentioned, what was the purpose of that?

MR. BROWN: Newsletters in New York State are being taxed by a sales tax and the newsletter publishers are trying to present to the state a recommendation that we not be taxed and that we are in fact newspapers and that we be treated as such, and that was conducted for that purpose.

MR. FRASE: Is there any information in the survey other than that which you have given us?

MR. BROWN: No. It was strictly economic.

MR. FRASE: The part that you have presented to us here?

MR. BROWN: No. It was strictly an economic survey for the Commerce Department, which they requested. We didn't go into anything else.

MR. FRASE: Did you go into costs?

MR. BROWN: Cost of production?

MR. FRASE: Yes.

MR. BROWN: No.

MR. FRASE: I would like to have it and I wonder if you could submit a copy of that survey for our records.

MR. BROWN: Surely. (ATTACHED)

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NEW YORK NEWSLETTER PUBLISHERS SURVEY - Nov. - Dec., 1976

We have been able to compile a list of about 250 Newsletter publishers within the state of New York.

They were all mailed a five part questionnaire in late November and early December.

Our return on the mailing was about 12 percent.

The following totals were reported to the questions we asked:

1. What are your anticipated gross revenues for 1976?
Total answer: \$33,623,000.
2. How many full time employees do you have?
Total answer: 403.
3. How many part time employees?
Total answer: 114.
4. How many entry level or training jobs do you provide per year?
Total answer: 61.
5. What is your anticipated gross payroll for 1976?
Total answer: \$8,585,500.

From our mailing records we were able to establish that of the 250 publishers located in the state, about 95 percent of them are located in New York City.

NEW YORK NEWSLETTER PUBLISHERS SURVEY - Nov. - Dec., 1976

From the figures on the preceeding page, we can arrive at a profile for

THE TYPICAL NEWSLETTER PUBLISHER IN NEW YORK STATE

This is based on the mean average:

Of the 250 publishers in New York state, the typical publisher will have

Sales of \$1,159,000 per year;

He will employ 14 full time employees, four part time employees, and will provide two entry jobs per publisher per year.

Stated another way, the full time and part time employees noted above become equivalent to 16 full time employees if you assume that part-timers work half time. Or, the equivalents equal full time jobs plus part-timers working half time.

The typical payroll for the New York Newsletter publisher is \$318,000 per year.

The sales to payroll ratio is 3.6 times.

The sales to fulltime equivalent employee is \$72,400 per employee per year.

Pay per full time equivalent employee is \$19,875 per year.

NEW YORK NEWSLETTER PUBLISHERS SURVEY - Nov. - Dec. 1966

From the figures on the preceeding page, we can arrive at some extrapolated totals for the Newsletter industry in New York state, which are of interest:

- a. The 250 odd publishers of Newsletters in New York State have an annual gross of \$289,750,000.
- b. The 250 odd publishers of Newsletters in New York state employ 3500 people each year
- c. The 250 odd publishers of Newsletters have a total payroll of \$79,500,000 annually.

These are factors which surely must be taken into consideration by every arm of the government as it seeks to control and tax this industry.

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2 MR. FRASE: I would also like to ask you
3 whether you would be willing to survey your members
4 with questions that I would like to have answered?

5 MR. BROWN: I would be delighted to. I
6 think it would be very educational for us as well.

7 MR. FRASE: How many members do you have?

8 MR. BROWN: As I say, we are only three
9 months old and we have about 125 members. We think
10 the universe is about 3,000 newsletters, and we expect
11 to penetrate that market quite efficiently before too
12 long.

13 MR. FRASE: Is there a geographical concentra-
14 tion?

15 MR. BROWN: Yes. Newsletters are concentrated
16 in primarily New York, Washington, Chicago and the
17 West Coast, but primarily New York and Washington.

18 JUDGE FULD: Are there any other questions?

19 (There was no response.)

20 JUDGE FULD: Thank you, Mr. Brown.

21 MR. BROWN: Thank you very much.

22 JUDGE FULD: We will recess for a few
23 minutes.

24 (After recess.)

25 JUDGE FULD: Our last speaker is Dr. Ferguson,

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STATEMENT OF THE
NEWSLETTER ASSOCIATION OF AMERICA
REGARDING
THE COPYRIGHT LAW
APRIL 1, 1977, NEW YORK, NEW YORK

My name is Ed Brown. I am President of the Newsletter Association of America. I am also publisher of eight Newsletters in a variety of business fields, from automotive to funeral service. I appreciate the opportunity to appear before this important commission on behalf of the newsletter profession.

I am here to speak for newsletters which are true journalistic enterprises. The Association does not currently represent house organs, publicity devices or the like. Most of our members produce publications which are published for profit and supported chiefly by subscription, (rarely by advertising) and are owned and operated independently of any industry, business, association or institution.

In actual fact, we believe we are newspapers in miniature. Most of our members publish at frequent intervals, some as often as daily, a vast number weekly, others bi-weekly, and still others monthly. The main purpose, and the bread and butter of virtually every newsletter is the collection and dissemination of news of general interest and reports of current events, within the field of its purview. I would carry this one step further and say that newsletters delve deeply into issues of consequence to readers and will generally offer interpretations of news affecting business and personal lives no different perhaps than

an editorial in a newspaper, but available to its readers in no other media.

The depth of perception and the ability to offer accurate analyses and forecasts within its selected area of expertise is what makes a newsletter important to its reader, perhaps above all other reading the subscriber may do.

The effectiveness and the appeal to the public of the newsletter concept is obvious from the fact that virtually every magazine today is inserting a newsletter page or two just prior to publication in order to bring late breaking news to its reading public. They have found this to have exceptionally high readership value. Thus, they have acceded to the timeliness and current value of newsletters.

The newsletter industry is uniquely vulnerable to violation of copyright for the following reasons:

1. The typical newsletter is very brief - - comprising a few pages, often no more than 4 - - and is therefore susceptible to quick photocopying in its entirety.

2. Since newsletters' income almost always comes from subscriptions alone, illegal reproduction and distribution have an immediate and often devastating impact on the market for the publication, thus the total viability of the publisher.

3. Newsletter publishing is small business in its very truest sense. With very few exceptions, each of the thousands of newsletters published in the United States is the product of a few journalists - - frequently only one - - often assisted only by their families.

4. A recent survey of the newsletter industry, conducted by Shirley Alexander when she was chairperson of the organization which preceded NAA's existence, shows that 19 percent have 500 or fewer subscribers; 21.5 percent have 501 to 1,000; 21.5 percent 1,001 to 2,000; 28 percent 2,001 to 5,000; 10 percent more than 5,000. With the average subscription running about \$50 yearly, it is starkly evident that the revenues of a typical newsletter constitute small business indeed.

Simple arithmetic demonstrates dramatically the drastic impact that even a limited amount of copying may have on the viability of a newsletter. A newsletter with 500 subscribers, charging \$50 a year, has a gross revenue of \$25,000. If illegal copying deprives the publisher of a mere 100 subscribers, he suffers a loss of \$5,000 - - or 20 percent of his income.

Some newsletters are written for very highly circumscribed audiences. Granted, they are high priced newsletters, but the economics of the market demands that, since their total subscriber list may be slightly over 100. A New York newsletter publisher told me last week that copyright protection is exceedingly important to him because if he lost only 10 percent of his market through photocopying, he would be forced to close down. Still, he is penetrating his market by an almost incredible 90 percent of its potential, so he has proven how important his material is. But a 10 percent fluctuation could do him irreparable harm.

I don't cite the above publisher as a horror story. It is more typical than the profession would like it to be, although it is one of the hazards we are willing to deal with, so long as we are protected on a copyright basis.

The Newsletter profession is a new industry. Recently a survey of publishers in New York state was conducted for a different purpose. But the few statistics I would like to relate here, are perhaps quite relevant to the situation.

There are some 250 newsletter publishers in New York state. They have an estimated annual gross of \$289 million. They employ about 3,500 people and have a total payroll of \$79,500,000 annually. That may seem contradictory with our earlier contention that this is a small business. But in fact, in the aggregate, that's not a tremendous amount of money, although it is important to relate this to the jobs, and the protection of those jobs, as well as the contribution this profession does make to the entire economy.

Our contribution is only sustainable if we have copyright protection.

As you can see from the figures we've used here, Newsletter publishers simply do not have the economic strength to police and litigate violations of their copyrights. Indeed, many publishers have not even filed their newsletters with the Register of Copyrights, believing that the cost of \$300 a year per newsletter, isn't justified by the insignificant amount of protection provided until now.

We do recognize that no Act of Congress can provide complete and automatic freedom from jeopardy.

We do believe that the intent of Congress in providing for "fair use" is eminently laudable. Our concern is that newsletters are peculiarly vulnerable to abuses of "fair use." The reproduction of even a single page of a newsletter - - or frequent reproduction of even mere sentences or paragraphs on specific topics - -

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can often provide a businessman with all he needs without cost, thus eliminating him as a source of revenue. In fact, many newsletters conduct surveys and analyses which result in a single critical number. The illegal copying of this single number can deprive the publisher of major revenues. For example, one of my publications has recently concluded a survey on the thinking within the soft drink industry of the controversial returnable bottle. Theft of certain segments of this survey, when reproduced in the newsletter, would vitiate the entire enterprise.

May we recommend therefore:

1. Exclusion of newsletters from any "fair use" reproduction. However, since most of our subscribers are businessmen - - and we have no desire to exclude students from access to our material - - we believe that not-for-profit libraries should be allowed "fair use." We believe that corporate and other business operated libraries should be excluded.

2. Should no "fair use" exclusion be made for newsletters we urge that copying of any portion of a newsletter be allowed only upon written permission of the publisher. Historically, most newsletter publishers are pleased to authorize such reproduction on an occasional basis.

3. If neither of the foregoing is warranted, we urge, at a minimum, that such language as the following be included in referring to "fair use:" "For Newsletters, fair use shall include reproduction of 50 percent of any article or 150 words, whichever is less. Each tabulation or graph shall be considered a separate article. Persons reproducing portions of a newsletter, should furnish the publisher with copies of such reproductions."

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On request of the publisher, such person shall provide him with the names, affiliations, and addresses of the persons to whom such copies were distributed."

We suggest this is at least the very minimum protection we should have under this new law.

The influence of newsletters on policy makers in government and industry is substantial and increasing. Therefore, the temptation to use our material in ways which are harmful to our marketing positions increases also.

We have heard some of the suggestions for the establishment of a clearinghouse for technical, scientific and medical journals. After having heard in brief outline what this constitutes, and following some discussions I have held with some of the individuals involved in these suggestions, I feel certain that if newsletter publishers were invited to join the undertaking, many would avail themselves of this opportunity. It is a new idea which we haven't had much time to examine yet, but I feel certain many would welcome it.

We sincerely appreciate this opportunity to appear before you and present our case. If there is any other way in which we may offer assistance to you in your work and deliberations, we will make every effort to do so.

Thank you again for this opportunity.

1
2 who will talk to us about economics.

3 STATEMENT BY

4 MR. ALLEN R. FERGUSON

5 PRESIDENT

6 PUBLIC INTEREST ECONOMICS CENTER

7 MR. FERGUSON: May I begin by apologizing
8 for being late?

9 JUDGE FULD: Yes, you are very late. You
10 have upset our program completely.

11 MR. FERGUSON: Well, I am very sorry.

12 JUDGE FULD: Go right ahead, sir.

13 MR. FERGUSON: As you know, I am President
14 of the Public Interest Economics Center, and we have
15 a contract with the Commission to examine some aspects
16 of the impact upon the public in general and consumers
17 in particular of possible alternative forms of legisla-
18 tion pertaining to the copyrighting or other protection
19 for certain kinds of materials, computer based materials
20 and photocopiable materials.

21 The main thrust of our activity or the
22 main output of our activity is to provide completed
23 information in the form of a report and testimony
24 to this Commission, and as intermediate products,
25 to provide information for two conferences of

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2 consumer and public interest groups to be held in
3 May and June.

4 We have submitted a very preliminary state-
5 ment of the approach we propose to undertake and we
6 will have a first report early in April which will
7 be disseminated to the participants in the first
8 of the conferences to be managed by the Public Inter-
9 est Satellite Association.

10 We will have a second report for their
11 second conference. Then those two reports will be
12 drawn together into the final report and will be
13 the basis for any testimony that the Commission
14 may ask.

15 Perhaps it will be useful to outline very
16 briefly orally the way we intend to proceed, and if
17 that is your pleasure, I will undertake to do that,
18 sir.

19 Our ultimate concern is with the impact
20 on consumers, which we take to be essentially synony-
21 mous with the public at large, by virtue of the fact
22 that at least from the point of view of economists,
23 the only legitimate purpose of economic activity is
24 to increase the well-being of the people and the
25 society at large, and since everybody in the society

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2 is in fact a consumer, whatever other roles they may
3 play, then one gets a good rough estimate of the
4 social impacts of any kind of economic activity by
5 looking at the impacts on consumers.

6 Of course, life can be a little bit more
7 complicated than that in some cases, but that is
8 still a first approximation to use.

9 There is no change that we can see at
10 this early stage in our activity in the relevant
11 kinds of legislation which would have any kind of
12 direct impact on the consumer. The impact on con-
13 sumers, except perhaps for individual copying through
14 the use of photocopying equipment, is likely to be
15 remote under existing technology. With future
16 technology it is obviously possible to imagine that
17 individual consumers can be affected by some kinds
18 of constraints that again one could imagine that
19 might be imposed upon the use of computer based
20 information.

21 But, by and large, the impact on consumers
22 is going to be indirect as far as we can see at this
23 time in our study and at this stage in technological
24 development in these two areas.

25 So the overall impact, the ultimate impact

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2 on consumers, while being indirect, will derive
3 essentially from the impact of the contemplated
4 legislation or any contemplated legislation on the
5 overall efficiency of economic activity, and, second-
6 arily, on any equity or fairness impacts that the
7 legislation might entail.

8 The fact that the impacts are indirect is
9 not synonymous with the proposition that they are
10 unimportant. They may be of major importance. The
11 economy is full of instances in which indirect impacts
12 are of major importance to consumers.

13 The weather in the recent months is a
14 clear example in that it has jeopardized some crops
15 and, like another recent example, the
16 oil cartel, will have indirect affects as well as,
17 in those two instances, a direct affect.

18 We propose to undertake really four or
19 five main tasks or examine four or five main areas.

20 The first is to develop some analytic
21 framework, some theory of the issues. The basic
22 tradeoff that appears to be important is the tradeoff
23 between inducing the creation of new materials and
24 making them currently available.

25 Speaking rather simplistically, the

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2 creators of the kinds of materials we are talking
3 about, literature or computer software and whatever
4 it may be -- to the extent that the creators, the
5 producers of such materials, are motivated primarily
6 by income, monetary incentives, then the greater
7 the royalties that they can receive for their
8 innovative efforts, the greater the amount of
9 information there will be.

10 It is simultaneously true that the greater
11 the protection, the higher the royalties, and let
12 me just use that word to embrace any payments that
13 derive from copyright or similar protection -- the
14 greater those payments, automatically the less the
15 currently available information for consumers or
16 for any other users of the material.

17 So this is the basic tradeoff we propose
18 to elucidate in our reports, the tradeoff between
19 reducing the accessibility or increasing the cost
20 of accessibility of the existing information in
21 the two categories that I have just mentioned versus
22 simulating an expansion of the stock of that material
23 at some future date. This is the basic tradeoff
24 which will have its ultimate impact on consumers.

25 There are two questions that logically can

1
2 be thought of as being subsumed under this tradeoff.
3 One is a fairly esoteric one that economists, I
4 suppose, have produced as many dissertations on
5 as any other, and that is the discount rate. If we
6 are trading off the possibility of more information
7 of some valuable sort in the future against the
8 effective availability of a smaller set of in-
9 formation in the present, the value that is set
10 on the increase of future information depends on
11 what economists call the discount rate, roughly
12 the equivalent of the interest rate.

13 I will elaborate on that further, but at
14 this stage we have nothing to say about that that is
15 peculiar to the area of interest here.

16 The second sub topic is the effectiveness
17 of alternative means of striking this balance, copy-
18 right versus patent type of protection versus trade
19 secrecy and possible alternatives that fall outside
20 the definitions of those three categories.

21 There are two ways that consumers are
22 influenced even less directly. One is the impact
23 of alternative methods of protecting materials upon
24 industrial structure, in particular upon monopoly
25 power. One can imagine, for example, that one set

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2 of copyright legislation or one set of statutes that
3 would protect trade secrecy, or one set of patent
4 laws would be more advantageous or less advantageous
5 to large corporations than to small. One can imagine,
6 for example, that it is more economical for large corpor-
7 ations to practice trade secrecy in the computer
8 related areas than it is for small corporations.
9 It may be easier, for example, for them to police
10 their clients.

11 We don't know what the answers are. I
12 only throw this out to indicate that this is a real
13 problem, and it is a problem that obviously has
14 indirect impact upon the consumers, both in terms
15 of their ultimate access to the materials protected
16 and in terms of their interest in a reasonably
17 effective market economy as a whole.

18 The final area that I want to allude to
19 at this point in terms of how consumers are affected
20 is what we might call and what we do call the cost
21 of the alternative methods of protection.

22 The cost takes several forms and we are
23 only at the beginning of
24 our analysis, but there are obvious direct costs.

25 There is the cost to the consumer of a

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2 royalty payment. There is the cost to the economy as
3 a whole, of the transactions involved in, for example,
4 the royalty payment. The mechanics of collection,
5 for example, may impose costs on society, and there
6 is the small subtle cost of foregoing the alternative.

7 If, for example, a system is developed
8 that is not the best system, then one of the costs
9 of that system is the advantages foregone by not
10 developing the better system.

11 At this point I have more or less touched
12 on simultaneously the relationship between possible
13 changes in the copyright law in this area and impact
14 on consumers on the one hand, and the overall theoreti-
15 cal structure on the other, or analytic structure.
16 Now I can move a little bit more quickly to the
17 rest of the task.

18 The second task after the development of
19 the analytic structure will be simply, and I guess
20 I use this because I haven't looked at it very
21 carefully, the analysis of the functioning of
22 alternative protection systems.

23 What is the difference among copyrights,
24 patents and trade secrecy as the three major kinds
25 of alternatives? How do they work? What are the

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2 transaction costs involved in each? How well do
3 they protect producers of information? And what
4 incentives do they provide? In particular with
5 regard to incentives, do they provide a means of
6 matching the royalty with the value of the material
7 generated? Do they compensate adequately for the
8 risks inherent in the innovative process?

9 The third task will be to look to some
10 degree, and obviously it will not be a penetrating
11 look, at the technology of the two kinds of sub
12 industries we are talking about, photocopying and
13 components of the computer industry. Both of these
14 are obviously areas in which the rate of technological
15 advance in recent years has been extraordinary.

16 Photocopying, for example, has totally
17 dispersed the process of reproducing the printed
18 page. Whereas, a generation or so ago, reproduction
19 of printed materials was highly concentrated, now
20 it is dispersed to essentially every library in the
21 country, every business organization, every educational
22 institution and so on, so that the technological
23 change has, as you are better aware than I, entirely
24 changed the institutional background for protecting
25 the interests of the producer of the initial information

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2 that is potentially to be copied.

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3 Similarly, we need to look at and we propose
4 to look at not only the salient features of the pre-
5 sent state of technology, but the expected future
6 developments over the relatively near term future,
7 say, over the next decade.

8 It may be reasonable to go a little further
9 than that, but in any event, the point is that we
10 will not restrict our considerations to nothing but
11 the present level of technology.

12 Then we will, as the fourth task, look at
13 the uses under the present law. How does the present
14 law work?

15 Now, this will be initially more for our
16 information than for yours. We will be getting this
17 information in order that our analysis will be valid.
18 I doubt that we will get much in this that will be
19 new to you who are familiar with this area; but then
20 we will go on, I hope, effectively to look at the
21 peculiar aspects of software, which is certainly
22 going to give us major problems, software having
23 characteristics, it appears, of things that are
24 normally subject to patent protection, and simultaneous-
25 ly some of the characteristics that are common to

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2 things that are normally subject to copyright protec-
3 tion, and both of those characteristics appear now
4 to be protected largely through the use of commercial
5 secrecy.

6 We have so far found very little that we
7 can say or even understand about the computer created
8 information. We have just begun to look at that,
9 and we have at this stage just now even scratched
10 the surface on that aspect of our areas of respons-
11 ibility.

12 The final task will be, as you could well
13 predict, the drawing together and analyzing of the
14 materials that we hope to complete in the first four
15 tasks, to make some effort to integrate that, hope-
16 fully to make a successful effort to integrate the
17 theory with the observations so that we can say
18 that given the existing and what we understand to
19 be the salient features of the future technology
20 and of the characteristics of the kinds of material,
21 given what appears to be the experience in some of
22 the related fields, what are the consumer interests
23 in the alternative ways of providing more or less
24 protection to these four categories of materials
25 with which we are concerned.

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2 Now, that is the major outline of what we
3 propose to do. We expect to have for the first of
4 the conferences a preliminary report covering all
5 of these topics in varying depths, and, as I have
6 indicated already, one of the shallowest areas will
7 be the computer created information.

8 JUDGE FULD: Will you describe for me what
9 sort of conferences these are going to be? What
10 sort of conferences are these that you
11 have in mind going to be?

12 MR. FERGUSON: Well, as I am sure you
13 are all aware, there are two parallel projects going
14 on here. The Public Interest Satellite Association,
15 is to organize a number
16 of conferences which, as I understand it, are
17 intended to provide information to and get opinions
18 and information from consumer and other public
19 interest advocates.

20 Our first report and our second report
21 are designed to be essentially staff work for those
22 conferences, spelling out the kinds of issues I have
23 identified here.

24 JUDGE FULD: Has a date been set for the
25 conference?

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2 MR. FERGUSON: Yes. I believe the first
3 one is to be the second of May -- I don't have that
4 in front of me -- and the second one is early June,
5 if I remember, sometime in the first part of June.

6 JUDGE FULD: Any questions?

7 MR. PERLE: Who is going to be at these
8 conferences? Who will be the participants?

9 MR. FERGUSON: Well, really they will be
10 people who are invited by the Public Interest Satellite
11 Associates.

12 MR. PERLE: What type of people?

13 MR. FERGUSON: My understanding is that
14 there will be consumer representatives and representa-
15 tives of other kinds of public interest groups.

16 MR. PERLE: What kind of public interest
17 groups?

18 MS. KARPATKIN: Mike, can you help us?

19 MR. KEPLINGER: The Public Interest Satellite
20 Association has been working with a wide range of
21 consumer organizations who have been concerned with
22 the public application of the technology of satellites,
23 dissemination of information, and through that they
24 have gained contacts with a group of consumer organ-
25 izations who have more technology orientation than

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2 the run of the mill consumer organization does.

3 Based on that experience and knowledge
4 they are going to select from that a group, a sub
5 set of consumer organizations, who have some concern
6 with the kinds of areas that we have under considera-
7 tion in this contract.

8 I have a list of some of the specific
9 organizations that I can give you if you would like
10 to see it.

11 MR. PERLE: I would like to see it.

12 MS. KARPATKIN: When you say, "consumer
13 organization," you mean public organizations, public
14 concern organizations?

15 MR. KEPLINGER: Yes, public concern organiza-
16 tions.

17 JUDGE FULD: Mr. Lacy.

18 MR. LACY: I am sure, Mr. Ferguson, that
19 as you and your colleagues pursue the study, the
20 analysis will become considerably more sophisticated,
21 but there are two areas that give me rather deep
22 concern at the moment where it seems to me the
23 initial presentation is superficial and fallacious.

24 One of the points of view taken as given
25 is that if we could go ahead with the increase and

1
2 diffusion of knowledge, that you have assumed that
3 a tradeoff is involved between stimulating the
4 increase by a process of inhibiting or restricting
5 the diffusion. Now, this is a tradeoff, and the
6 copyright, essentially high level of copyright,
7 is a device to stimulate increase of creation by
8 restricting diffusion.

9 I think this is a fundamentally erroneous
10 conception of the function of copyright, which is
11 primarily to increase diffusion in the practical
12 world. One of its major functions is to provide
13 the incentive to investment in the quite expensive
14 process of mass diffusion of knowledge.

15 A case in point that is very relevant to
16 our present purposes is, for example, the question
17 of scientific, technical and medical journals which
18 are frequently reproduced in part by photocopying
19 processes. The existence of copyright is relatively
20 irrelevant, essentially, to the stimulus of the crea-
21 tion of the scientific knowledge embodied in those
22 journals, which gets paid for in many other ways: by
23 academic promotion to those who publish, by National
24 Science Foundation grants and so on. The one function
25 of copyright there is to increase the diffusion of

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2 that knowledge by providing an inducement to the
3 publishers of scientific journals to invest in
4 this diffusion, and any assumption that diffusion
5 and innovation are opposed functions with copyright
6 lying on the side of one of those and restriction on the
7 side of the other is just plain wrong, and I think any
8 approach that starts with that as a tradeoff is
9 going to be led down all sorts of blind alleys.

10 The second point that I worry about and
11 what seems to be superficiality is that from the
12 latter part of the 19th Century on, and this was
13 true in lesser degrees earlier but it has been
14 markedly true from about the 1870's on, the com-
15 munication of knowledge and of literature and of
16 music and of cultural experiences between the
17 creators and the public was being mediated by
18 relatively large scale organized industries, these were the
19 publishing industry, (book, magazine and newspaper publishing
20 initially,) which assumed its present commercial
21 shape really in the latter part of the last century
22 and then later, the broadcasting industries of radio and
23 television.

24 Now, copyright has provided an incentive
25 for the investment of billions of dollars in those

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2 diffusion industries, and we have already touched
3 that point.

4 But a second point I think is that the
5 particular provisions of copyright law have had
6 an important effect in shaping the structure of
7 those industries which has had an impact on the
8 public and the consumer.

9 To illustrate, the 1909 law had a provision
10 for the compulsory licensing for the making of phono-
11 graph records of musical compositions, which survived
12 with some modifications in the new law.

13 It also for the first time gave a right
14 to the composer which he could then vest in others
15 if he chose, license others, and includes the right
16 of the public performance of his work for profit,
17 a right which he didn't previously have.

18 Now, the existence of these two previously
19 non-existent provisions of copyright law and the
20 introduction of these in the 1909 law had a great
21 deal to do not only with permitting the creation
22 but with shaping the particular structure of the
23 record industry.

24 For example, absent the compulsory mechanical
25 license, we would have had a different record industry

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2 with different consumer effects than we in fact had,
3 if we had not had compulsory licenses.

4 If the radio, motion picture and record industries
5 had been able to develop without the music performance and
6 mechanical royalty provisions of the 1909 Act,

7 we would have
8 had a very different shape of those industries.

9 Now, you touched on this, and I am sure
10 you have become well aware of it as you went into
11 it, where a reliance on trade secrecy versus copyright
12 would shape the software industry in the direction
13 of concentration in big companies versus little.

14 I am suggesting that that is a very important
15 and very prescient observation that leads me to believe
16 that you make equally prescient ones in other areas
17 that you go into, but I do think it is not by any
18 means a simple consumer versus producer thing. It
19 is what shape does copyright tend to give to industry?
20 What, for example, has been the impact or will be
21 the impact of the cable provisions of copyright on
22 cable versus free broadcasting?

23 Now, I think this would be particularly
24 true, as you pointed out, in the software and data
25 base industries. I think that in photocopying the

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2 question is going to be to indicate out of the enormous
3 amount of photocopying, how much will be
4 tax supported and carried on in tax supported
5 libraries? How much of it will be largely tax
6 supported, but at prices that are not realistic, and
7 how much of it will be user supported being carried
8 on through commercial operations? What sort of shape
9 will be given to the publishing industry? This is a much more
10 complex matter than just is it cheap or expensive.

11 You get questions of how much of it is
12 government controlled, how much of it is privately
13 controlled, how much of it is big business, how
14 much of it is small concerns and I hope that this
15 sort of insight, such as your suggestion about the
16 copyright versus trade secrecy in the structure of
17 the software industry, would be carried through the
18 rest of the study.

19 JUDGE FULD: Professor Nimmer.

20 VICE CHAIRMAN NIMMER: With reference to
21 the last remarks by Mr. Lacy, they certainly are
22 relevant and well taken.

23 On the other hand, Dan, you speak of the conflict
24 between the public interest and the owner as being,
25 in a sense, a false conflict, and I understand your

1 point, Dan, and I think it is well taken, but I
2 think maybe you made the point more sweepingly
3 than you intended, or at least more sweepingly
4 than I can accept. Your suggestion that there
5 really is no conflict --
6

7 MR. LACY: I am saying an analysis that
8 starts on the assumption that there is this one
9 single conflict and that that is what you study is
10 wrong.

11 VICE CHAIRMAN NIMMER: Just let me point
12 out that in some contexts, I think it is pretty well
13 clear that if the work is without any protection,
14 then the public domain dissemination will increase --
15 not in all contexts, as you point out, but if tomorrow
16 the works of Hemingway turned out to be in the public
17 domain, I venture to say there would be some book
18 publishers publishing Hemingway that had not planned
19 to do so.

20 There certainly would be some motion
21 picture productions based on Hemingway that wouldn't
22 otherwise occur, and, more specifically in the area
23 of software, it is not clear to me that the protection
24 for software is an impetus to a dissemination in an
25 immediate sense. It may be an impetus to its

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2 creation, but not I think to its dissemination. At
3 least, if that is the case, I would want some further
4 elucidation on it.

5 I think one problem with the approach that
6 it is a false conflict altogether is that you then
7 begin with the assumption that there should be protec-
8 tion, and the only question is what kind of protection
9 is best. I haven't crossed that bridge yet. I may
10 well cross it and take the position that there should be protection
11 for software, but I want in the first place, speaking just
12 for myself, an analysis from you, Mr. Ferguson, if
13 it is feasible, as to the ultimate effect on the
14 consumer.

15 Is there more to be gained or lost by
16 protection for software? I don't assume a conclu-
17 sion on that yet. I think I may well come around
18 to views previously expressed in this group and
19 expressed by the Whitford Committee that protection
20 is desirable, but I'm not sure of that answer and
21 I think your study can be helpful in that regard.

22 MR. LACY: If I have left the impression that
23 I felt that there was no element of tradeoff in here,
24 then I have said more than I meant to say.

25 What I meant to say is an approach to the

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2 subject that assumes that that is the only and crucial
3 basis of an analysis is quite wrong. Certainly one
4 could for any particular work, especially a work
5 already in existence, make a case that its dif-
6 fusion -- granted a given industrial structure, a
7 given structure of communications that has risen on
8 the basis of the copyright law, and given that the
9 work has already been created -- one can obviously make
10 a case that the removal of copyright protection is
11 likely to increase or at least lower the cost of
12 its diffusion.

13 Hemingway is an example, but the fact that
14 there would be a number of commercial motion picture
15 companies that would then proceed to make movies
16 based on Hemingway's stories that they wouldn't
17 otherwise -- I am skeptical that that is true, but
18 assuming that it is true, it is because there is
19 a motion picture industry which has been created
20 on the basis of copyrights.

21 There is a whole structure of media that
22 only exists on that basis, because it would be
23 impossible to conceive of a privately supported -- as opposed
24 to a government supported -- motion picture industry
25 if there were no copyright.

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2 Similarly, the publishing industries that
3 would then publish Hemingway are publishing industries
4 that have grown up within the framework of a copyright
5 structure.

6 I am saying copyright has been one of the
7 shaping matrices in which the information industries
8 of the country have arisen, and it isn't just a question
9 of the effect on this or that particular title; it
10 is the effect on shaping those industries, giving
11 them incentives to come into being, balancing governmental
12 versus private ownership control of them, monopolistic
13 versus diffused ownership of them -- issues like that
14 which I think are the real guts of this.

15 JUDGE FULD: Mr. Perle.

16 MR. PERLE: My confreres are quicker than
17 I am. They are talking about a tradeoff that I
18 didn't hear you say.

19 Would you be good enough to slowly go
20 over the tradeoffs that you are assuming exist?

21 MR. FERGUSON: Let me emphasize one
22 tradeoff.

23 MR. PERLE: No.

24 MR. FERGUSON: I will come to that. One
25 is a tradeoff between the depth of the study and

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2 the time and resources devoted to it. We will not
3 produce the definitive work on this subject.

4 The tradeoffs with which we will be con-
5 cerned within the constraints of that one are, I
6 recognize, Mr. Perle, more complex than I indicated
7 in the summary statement and I am sure they are more
8 complex than I realize they are, but let me go back
9 more or less to the beginning of that.

10 I said that to the extent that the creators
11 of the kinds of information we are talking about are
12 responsive to monetary incentives, and that statement
13 implies that we should look at the situation where
14 they are not responsive at least primarily to monetary
15 incentives -- to the extent that they are responsive --
16 the generators of information -- to monetary incentives,
17 then the larger the payments to them the more innova-
18 tion, the more creation the society will get.

19 Now, it is simplified by speaking as if
20 the producers of information were a homogeneous
21 set of both what you might call the original
22 generators, the artist or the mathematician who
23 develops an algorithm, and the publisher or the
24 software corporation. I spoke as if they were a
25 homogeneous set juxtaposed vis-a-vis the people who

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2 use the material.

3 Mr. Lacy has pointed out that they are
4 not a homogeneous set. I have specified the trade-
5 off in terms of the interests of the producers
6 having compensation for their
7 creative and certainly some of their dissemination
8 activities, and I have suggested, and I think it is
9 correct, that the role of the copyright and similar
10 things is to provide through royalty payments for
11 an adequate level of what I have called creative
12 activities, but I must find a term that also embraces
13 some of the dissemination activities.

14 The tradeoff that I am talking about
15 essentially is the larger the payment to those
16 people obtained, for example, through royalties,
17 the larger the cost to the user, and hence in
18 economic terms, synonymously, the lower the avail-
19 ability of the materials to those users, the lower
20 the existing stock of materials,

21 The Hemingway example is precisely the
22 kind of thing that I had in mind, without regard
23 to which of you gentlemen is precisely
24 correct. The fact is that the existing materials
25 having copyright protection, whatever they may be,

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2 do in some areas reduce the availability of that
3 material to consumers.

4 MR. PERLE: You are assuming that all
5 material created is of equal desirability to consumers.

6 MR. FERGUSON: No, no, certainly not.

7 MR. PERLE: I would just like to stop it
8 right here. Are you saying that if one
9 creator gets a higher royalty rate,
10 that means that that material is less available
11 to the public?

12 MR. FERGUSON: Less available to the public
13 than it would be at a lower royalty rate, not than
14 it would be in some absolute sense.

15 MR. PERLE: Well, you are getting into
16 murky waters. You are getting into the question
17 of whether the man who has forty years of expertise
18 and brilliance who charges more is giving the
19 consumer at that higher price more than the
20 consumer would get at a lower price from someone
21 else. That is what it sounds like to me.

22 MR. WEDGEWORTH: No, no. The proposition
23 is obvious. All he is saying is if you pay Henry
24 Kissinger three million dollars for his work, the
25 cost of that work and other works in the future is

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going to go up and it means that the ultimate consumers are going to pay more for the books.

MR. PERLE: That is simply not true. As a publisher who bought Kissinger, that is not true.

MR. WEDGEWORTH: It ought to be obvious to you -- but there is another level to this that is even independent of that proposition, and that is that you have different reward systems. You have the one that is monetary, but if you take a system such as the scholarly communities, where the reward system is not based on the monetary return but on reputation and the reputation among peers, the fact is that the increase of any financial rewards doesn't benefit that creator at all and would have no effect on their incentives to publish or not to publish.

MR. DIX: Just a footnote on Bob's comment. You could get statistics, I believe, to show that the rate of productivity tends to go down as the salary goes up, so you have that little problem to contend with too.

MR. PERLE: I just want to understand it.

MR. FERGUSON: I think it is fair to make one comment on Mr. Wedgeworth's point, and that is

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2 that I want to emphasize that the initial structure
3 is simple and I hope that we will be able to get
4 beyond the simple structure, but the academician
5 and the artist and some other people who are motivated
6 largely if not entirely by non-pecuniary rewards
7 benefit directly from the dissemination of their
8 work without regard to the monetary compensation.

9 This is why people put paintings in shows
10 where they have no expectation of a sale, or, this
11 is one of the reasons why they put paintings in shows
12 where they have no expectation of a sale.

13 Now, that is a consideration in which some
14 level of formal economics can be taken into account.
15 I don't want to get into that but the simple tradeoffs
16 that I am talking about derive in the cases where
17 the generation and some degree of dissemination are
18 dependent upon monetary rewards, and what I am
19 basically saying is that the higher the monetary
20 reward the larger the future stock of such information
21 is bound to be. People who write for money are
22 likely to write more if there is more money for them.
23 People who create programs in order to maximize their
24 wealth --

25 MR. PERLE: I'll buy that.

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2 MR. FERGUSON: Okay.

3 MR. PERLE: That I will buy.

4 MR. FERGUSON: Now, the other side of that
5 is that somebody has to pay for it and that is the
6 tradeoff, and now it is quite possible and I think

7 -- in fact, I suspect it is true in a dynamic
8 sense and, in fact, I can make an assertion that it
9 is true -- looked at dynamically, there is some optimal
10 level of compensation for, let me say, creativity to
11 embrace a lot of activities. There is some optimal
12 level of compensation for creativity above zero -- in
13 other words, not free dissemination, not free avail-
14 ability -- some optimal level of compensation which
15 will give the consumer more material in the future
16 at the expense of some reduction of the material
17 available in the present.

18 If the incentive for creating whatever it
19 is we are talking about, computer programs, is high
20 now and people can see with high confidence that if
21 they are clever and create good programs they will
22 be rich, then under the usual assumptions of economics,
23 there will be more programs ten years from now than
24 in the opposite case.

25 At the same time, to provide them assurance

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2 that they will get rich creating new programs or
3 have a gambler's chance of getting rich creating
4 new programs, the reality is that present programs
5 probably have to be protected so that they are in
6 a context where they can see that it is in their
7 interest to make more programs available for future
8 years.

9 To simply tell them without such an insti-
10 tutional construct that somehow they will get ample
11 compensation in the future I think would leave any-
12 body smart enough to generate good programs with a
13 certain amount of insecurity about the whole proposi-
14 tion.

15 Now, this is where Mr. Lacy mentioned that there
16 are alternatives, as you are well aware, to royalty
17 payments for creativity. Royalty payment through
18 whatever mechanism is obviously a kind of a gambling
19 game in which one hopes that the market will set a
20 high value on his or her creation.

21 An alternative is clearly the subsidization
22 of creativity where one goes to work for a research
23 foundation, let's say, and gets paid for undertaking
24 to be creative in a specified area and that his risk
25 is less, and that is also so for the individual poet,

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2 programmer, author or whatever, where he or she fore-
3 goes the prospect of becoming a Grandma Moses or a
4 Hemingway for the security or the relative security
5 of a salary from somebody.

6 That is done obviously very extensively
7 in military research and development, for example.
8 It is done less extensively through various kinds
9 of foundation grants. It is what one would hope
10 would come out of things like the Foundation for
11 Humanities. It is done in various ways and with
12 a complex set of rewards in the academic community.

13 Those, in effect, are alternatives to the
14 copyright, patent, trade secrecy mechanism of compensa-
15 tion for the supplying of information.

16 MR. LACY: Mr. Chairman?

17 JUDGE FULD: Yes, Mr. Lacy.

18 MR. LACY: I have a couple of further
19 observations.

20 I think the last remark of Mr. Ferguson's
21 about the alternatives for payment for creativity
22 through foundation and government support versus
23 royalties is precisely one of the points that I was
24 trying to make, that the nature of the rewards systems,
25 being a part of the structure of the copyright law,

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2 has very important social consequences quite apart
3 from the price to the consumer of the product.

4 One can envision a system in which only
5 those writers wrote who could afford
6 to write or only those researchers who could afford to,
7 did research, or those whose work evoked the sympathetic
8 concern of foundations or of the government, as opposed
9 to the present one in which one can take his own risks and if
10 he can find the public willing to support it, he will
11 succeed.

12 This means that the Rod McKuen's of this
13 world who write poetry, as well as those poets who
14 appeal to foundations, will write -- a fact
15 of tremendous social consequence, a difference in
16 social consequence between a system that requires
17 rewards to come from established sources, governmental
18 and foundations, and a system of reliance on the consumer.

19 The second point I would like to make is
20 that increased payments to the creator or to those
21 who invest in the dissemination of works do not by
22 any means necessarily increase the cost to the
23 consumer per unit of goods if they have the effect
24 of providing an inducement for investment in more
25 efficient means of dissemination.

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2 The case in point is the fact that the
3 copyright law is such that ABC was willing to invest
4 in a gamble in producing Roots, and 60 or 70 million
5 people had a chance to experience at least one aspect
6 of Mr. Haley's work at a very much lower cost than
7 would have been possible otherwise. He and ABC both
8 made a vast sum of money out of it, but the cost to
9 the consumer was reduced, not increased by that, and
10 that is true of the investment in mass market
11 paper bound production of books and in commercial
12 publishing in general.

13 One last comment that I have: Most classic
14 economic analysis and especially micro economic analysis
15 obviously assume an existing institutional structure
16 and an existing state of society and makes analyses
17 within that, the example we discussed was that since there
18 is a movie industry and since there is a publishing
19 industry, when Mr. Hemingway's works go in the public
20 domain--or to take a real example, when Mark Twain's
21 work went into the public domain--you did have a
22 proliferation of Mark Twain in the mass market paper-
23 backs, and you may have had somewhat more TV use of
24 his work than would have been true if you had to pay
25 a royalty.

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2 We need here more of an institutional and
3 historic economic analysis that assumes that the
4 factors with which we are dealing operate not only
5 within an existing structure, but shape the develop-
6 ment of the structure; as the 1909 copyright law
7 shaped the structure of the record industry, as
8 whatever is adopted by Congress now may help to shape
9 the structure of the software and machine readable
10 data base industry and as, of course, the whole
11 structure of the communications industries for good
12 or ill are certainly being shaped by copyright .

13 MR. CARY: Mr. Chairman?

14 JUDGE FULD: Yes, Mr. Cary.

15 MR. CARY: I would like to ask Mr. Ferguson
16 a question and make a very brief observation.

17 The question is what is the due date of
18 your contract? When are you supposed to furnish this
19 to the Commission?

20 MR. FERGUSON: The final report is due
21 the 30th of June.

22 MR. CARY: Thank you. My observation is
23 that if we don't cease our comments here today, we
24 may not give you the time in which you can finish
25 that.

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2 MR. FERGUSON: May I make an observation
3 on your observation?

4 MR. CARY: Yes, sir.

5 MR. FERGUSON: I have found these comments
6 very stimulating and useful in thinking about how
7 to address this problem. I am impressed with the
8 tightness of our deadline, but I have found it very
9 useful.

10 JUDGE FULD: Are there any further questions?

11 MR. DIX: One rather brief observation.

12 On terminology, in the heading of this
13 paper you refer to the ultimate consumer, and I
14 don't believe you used the word "ultimate" very often
15 in the context.

16 I can see some confusion arising if somehow
17 you are not careful to emphasize you are talking about
18 this abstract general consumer.

19 For example, take the example of chemical
20 literature. The obvious consumer of chemical
21 literature is the chemist and nobody else, but
22 you are not talking about anyone like that here.
23 You are talking about society.

24 MR. FERGUSON: We are talking about the
25 person who ultimately takes the additive that the chemist

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2 invents by virtue of reading the journal article
3 or whatever it may be.

4 Now, again, the consumer in that sense
5 is frequently represented by a surrogate. For
6 example, in the photocopying area, the library is
7 the surrogate for the consumer in our sense.

8 You are quite right about the confusion
9 between user and consumer, and it is going to be
10 difficult to keep those straight and to show the
11 relationship between the two.

12 MR. DIX: Furthermore, at the primary
13 level, the chemist again, the consumer is frequently
14 the producer as well.

15 In almost all cases of scholarly literature,
16 a sub set of the total number of consumers is the
17 somewhat smaller group of producers, and I take it
18 your general intention is to stay away from those
19 special problems and talk about the ultimate consumer.

20 The reason I make this comment is simply
21 to suggest that you find ways in making the reports
22 of re-emphasizing that fact as you go along so that
23 people don't forget.

24 MR. FERGUSON: Thank you.

25 MR. SQUIRES: Mr. Ferguson, I am not sure

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2 I understood you. Did I understand you to say that
3 you did not assume that trade secrecy protection was a
4 form of protection more amenable to the interests
5 of large corporations or more easily enforceable,
6 but that it was a possibility?

7 MR. FERGUSON: That is a correct statement.
8 Your understanding is correct.

9 MR. SQUIRES: I would only like to make
10 one comment. I was at a meeting recently of a large number of
11 small software producers and while there is by no means any
12 homogeneity of opinion amongst them, there was a considerable
13 number of them who found trade secrecy an important form of
14 protection. I wonder if it is not the case that trade secrecy
15 provides no greater advantage to large producers than to small ones,
16 or that the advantage allegedly ascribed to large producers is a
17 product of size and applies equally to any form of legal protection,
18 be it patent, copyright or trade secrecy.
19 Large corporations have that advantage in their ball park to
20 some extent.

21 MR. FERGUSON: Yes. I think the question
22 is the incremental impact on the advantage of a
23 large corporation, and one can easily imagine
24 a small highly specialized software firm that
25 has a very small specialist market whose problems
of enforcing trade secrecy might be equally small,
so it is not at all clearcut, and essentially at
this stage, all we are saying is that that is an

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2 important issue.

3 MR. PEYTON: I have a couple of questions
4 for you, Dr. Ferguson.

5 You have already talked somewhat about
6 the difference between monetary and non-monetary
7 incentives. There are two cases which I think might
8 be helpful for you to examine specifically. One
9 regards authors who have important non-monetary
10 incentives.

11 We talked about clearing houses yesterday,
12 and what difference ^{it} might or might not make
13 to include journals whose contributing authors are
14 motivated primarily by non-monetary incentives or
15 by monetary incentives. That is one thing you might
16 look at for us.

17 Another thing you might look at is to what extent
18 incentives play a part among the computer programs,
19 such as, for example, if programming is exclusively
20 a price-elastic activity. I don't know whether that
21 is the case or not, but I am not sure that that
22 is an assumption that you made.

23 MR. FERGUSON: No, we are not making that
24 assumption. I think I used an example in which I
25 assumed that computer programming was price-elastic,

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2 and I know from personal experiences where that is
3 the case, but we are making no general assumptions
4 that that is universally the case.

5 MR. PEYTON: Also you mentioned the
6 implicit discount rate. You might be able to give
7 us guidance about whether there is an appropriate
8 period of copyright protection given a certain
9 discount rate.

10 We have seen some figures which indicate
11 that the rate of return in computer programming is
12 approximately what it is in the general economy,
13 ten percent or a bit less, and if you could take
14 that as the discount rate perhaps you might be
15 able to work backwards and tell us what an appropriate
16 period of copyright protection is.

17 Is that a feasible project within the
18 bounds of the study?

19 MR. FERGUSON: I think almost certainly
20 not. I think that we can sort of raise the issues
21 and point out that the consumer will be hurt or
22 helped, depending on how bad or how good the
23 ultimate legislation is, but I think that to come
24 out with any kind of a number, that is a very
25 complicated and involved thing.

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2 Also, if I may, as an aside, one would
3 expect that the rate of return on anything is roughly
4 equal to the rate of return on anything else, and
5 those are average rates and they don't really tell
6 you anything about the marginal rates, which of
7 course are important with relation to incentives.

8 MR. PEYTON: One final general comment
9 and that is, based on your presentation this morning
10 on the initial working papers by your staff, it
11 would seem that your work is going to be mostly
12 theoretical in character.

13 Do you expect the final report to be a
14 largely theoretical work, or will you have more
15 grounding for your final conclusions?

16 MR. FERGUSON: Well, you understand that
17 we are not going to come up with recommendations
18 of the kind you are talking about.

19 What I construe our role to be is to raise
20 issues and to point out where the consumers' interests
21 lie.

22 JUDGE FULD: You might suggest getting rid
23 of copyright altogether.

24 MR. FERGUSON: Well, conceivably. You
25 know, I think that the essence of a tradeoff structure

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8 almost inevitably implies that you don't go to zero
9 on either axis. It essentially is stated as a
10 problem where one is looking for the optimal point
11 of balance between the conflicting considerations,
12 so whereas you always can find that the things that
13 you thought you traded off each other don't -- that
14 case that Mr. Wedgeworth mentioned of certain authors,
15 rather than wanting to restrict dissemination for
16 their monetary income would love as much dissemination
17 as possible for their private income so there you
18 don't have that tradeoff, but I would certainly not
19 expect any such result from our work.

20 JUDGE FULD: Are there any other comments
21 or questions?

22 MR. FERGUSON: If it is useful, I might
23 say that what I would expect that we might be able
24 to do in a fairly sensible way, not by any means
25 entirely rigorously and I think everyone should

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2 understand that, is to say things like "It appears
3 on the basis of what we have done that there would
4 be the following kinds of benefits to consumers
5 deriving from a tightening of the copyright protec-
6 tion in one sector and from a loosening of copyright
7 protection in another sector, and that the kinds of
8 costs that would be associated with those two moves
9 would be of this sort..".

10 That is the kind of result that I anticipate
11 we will come up with, not that "The following statutory
12 wording makes sense, and if it is followed precisely
13 the benefits will be \$108,000,000 per year over the
14 next forty years." We are not going to come up with
15 something like that.

16 JUDGE FULD: If there is nothing more,
17 thank you, Professor.

18 MR. FERGUSON: And I apologize for my
19 tardiness.

20 JUDGE FULD: There being nothing more,
21 we will adjourn the meeting until sometime in May.

22 (Whereupon, at 12:00 o'clock noon, an
23 adjournment was taken.)

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